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No. 13015

United States
Court of Appeals
for the Ninth Circuit.

TITLE INSURANCE AND GUARANTY COMPANY, a Corporation; EDITH A. WILDE, Administratrix of the Estate of JEROME J. WILDE, Deceased, and MERVYN GOODMAN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

**Appeal from the United States District Court,
Northern District of California,
Southern Division.**

No. 13015

United States
Court of Appeals
for the Ninth Circuit.

TITLE INSURANCE AND GUARANTY COMPANY, a Corporation; EDITH A. WILDE, Administratrix of the Estate of JEROME J. WILDE, Deceased, and MERVYN GOODMAN,

Appellants,

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Appellee.

Transcript of Record.

Appeal from the United States District Court,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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San Francisco, Calif.,

Attorneys for Appellee.

In the District Court of the United States in and
for the Northern District of California, South-
ern Division

No. 22261-G

UNITED STATES OF AMERICA,

Plaintiff,

vs.

193 ACRES OF LAND, CITY AND COUNTY
OF SAN FRANCISCO, STATE OF CALI-
FORNIA; MATILDA PRIOR ANDREWS
II, et al.,

Defendants.

VERDICT

Parcel No.	Acreage
16	4,611 square feet
45	27,759 square feet
46	51,562 square feet
50	120,000 square feet

Verdict

We, the jury, find that the fair market
value of Parcel 16 containing 4,611 sq.
ft. is the sum of.....\$ 46.11

We, the jury, find that the fair market
value of the annual use of Parcel 16
is the sum of.....\$ 20.00

We, the jury, find that the fair market
value of Parcel 45 containing 27,759 sq.
ft. is the sum of.....\$ 277.59

We, the jury, find that the fair market value of the annual use of Parcel 45 is the sum of\$ 125.00

We, the jury find that the fair market value of Parcel 46 containing 51,562 sq. ft. is the sum of.....\$ 515.62

We, the jury, find that the fair market value of the annual use of Parcel 46 is the sum of\$ 232.50

We, the jury, find that the fair market value of Parcel 50 containing 120,000 sq. ft. is the sum of.....\$2,400.00

We, the jury, find that the fair market value of the annual use of Parcel 50 is the sum of\$ 980.00

/s/ SIDNEY P. LAGORIO,
Foreman.

[Endorsed]: Filed December 13, 1950.

In the District Court of the United States in and
for the Northern District of California,
Southern Division

No. 22261-G

UNITED STATES OF AMERICA,

Plaintiff.

vs.

193 ACRES OF LAND IN THE CITY AND
COUNTY OF SAN FRANCISCO, STATE
OF CALIFORNIA, MATILDA PRIOR AN-
DREWS II, et al.,

Defendants.

PRELIMINARY JUDGMENT AS TO
PARCELS 16, 45, 46 AND 50

The above-entitled action came on for trial before the above-entitled Court, the Honorable Oliver J. Carter presiding, as to Parcels 16, 45, 46 and 50, on the 11th day of December, 1950, plaintiff being represented by its attorneys M. Mitchell Bourquin, Special Assistant to The Attorney General; George De Lew, Esquire, and J. Harold Weise, Esquire, and defendants Title Insurance and Guaranty Company, a corporation, sued herein as Eighth Doe, Edith A. Wilde, Administratrix of the Estate of Jerome J. Wilde, sued herein as Fourth Doe, and Mervyn Goodman, sued herein as Fifth Doe, being represented by their attorneys Young, Rabinowitz and Chouteau, and Frank T. O'Neill, Esquire, and defendants Charles N. Douglas, sued herein as

Sixth Doe, Ethel Tisdall Allen, sued herein as Seventh Doe, and Maria Lorenza Trussell, being represented by their attorney Frank A. Rethers, and a jury having been regularly impaneled and sworn for the sole purpose of determining the fair market value of Parcels 16, 45, 46 and 50 of the land taken by this action and subject of this trial, and more particularly hereinafter described, together with any damages resulting therefrom, including the fair market value of the use and occupancy of said parcels of land from the date of plaintiff's possession up until the date of trial, and evidence both oral and documentary having been introduced at the trial and the jury having been fully instructed returned its verdict on the 13th day of December, 1950, finding the fair market value of said parcels of land on the 25th day of July, 1952, to be as follows: Parcel 16, Forty-Six and 11/100 Dollars (\$46.11); Parcel 45, Two Hundred, Seventy-Seven and 59/100 Dollars (\$277.59); Parcel 46, Five Hundred, Fifteen and 62/100 Dollars (\$515.62); and Parcel 50, Two Thousand, Four Hundred and No/100 Dollars (\$2,400.00); and that the fair market value of the damages resulting therefrom including the fair market value of the use and occupancy of said parcels of land from the aforesaid 25th day of July, 1942, to and including the date hereof to be as follows: Parcel 16, Twenty and No/100 Dollars (\$20.00); Parcel 45, One Hundred, Twenty-Five and No/100 Dollars (\$125.00); Parcel 46, Two Hundred, Thirty-Two and 50/100 Dollars (\$232.50); and Parcel 50, Nine Hundred, Eighty and No/100 Dollars (\$980.00), and the Court being fully informed, finds:

I.

The Complaint in this action was filed on the 25th day of July, 1942, and that plaintiff, through the United States Navy Department, did on the aforesaid 25th day of July, 1942, enter into the exclusive possession and control of said Parcels 16, 45, 46 and 50 and ever since has been and now is in the exclusive possession and control of said parcels of land.

II.

That the use of which said parcels of land hereinafter described are taken and condemned by the plaintiff is one authorized by law and said property and the taking thereof is necessary and suited to said use.

III.

That all parties interested directly or indirectly in the above-mentioned parcels of land have been personally served with process or have appeared in said action; that such parcels of land, together with all claimants and parties interested therein, are within the jurisdiction of this Court which has power and authority to enter this judgment.

IV.

That all taxes and assessments against the property hereinafter described have been paid, and defendant City and County of San Francisco has filed a Disclaimer, and the Court finds that said disclaiming party has no interest in said property or in the compensation to be awarded for the taking thereof.

V.

That the fair market value of Parcels 16, 45, 46 and 50 subject of this action, and hereinafter more particularly described, on the aforesaid 25th day of July, 1942, was as follows: Parcel 16, Forty-six and 11/100 Dollars (\$46.11); Parcel 45, Two Hundred, Seventy-seven and 59/100 Dollars (\$277.59); Parcel 46, Five Hundred, Fifteen and 62/100 Dollars (\$515.62); and Parcel 50, Two Thousand, Four Hundred and No/100 Dollars (\$2,400.00).

VI.

That the fair market value of damages resulting therefrom including the use and occupancy of said parcels of land from the aforesaid 25th day of July, 1942, up until the date of trial is as follows: Parcel 16, Twenty and No/100 Dollars (\$20.00); Parcel 45, One Hundred, Twenty-five and No/100 Dollars (\$125.00); Parcel 46, Two Hundred, Thirty-two and 50/100 Dollars (\$232.50); and Parcel 50, Nine Hundred, Eighty and No/100 Dollars (\$980.00).

VII.

That at the time of and immediately prior to the filing of the Complaint and entering into possession by plaintiff, the following persons were the owners of an undivided interest in said parcels of land as follows:

72/360 in Clara P. Morton.

72/360 in Mary A. McLellan.

56/360 in William Thompson Garratt Allen, also known as William Garratt Allen.

- 16/360 in Mildred Morgan.
- 9/360 in Henry Clay Bond.
- 9/360 in Maxwell W. Bond.
- 9/360 in Florence Eldredge.
- 9/360 in Frederick W. Bond.
- 9/360 in Estate of Alice Eldredge, Deceased.
- 3/360 in Charles Bosse.
- 3/360 in June Lenore Bosse.
- 3/360 in William Maxwell Bosse.
- 18/360 in Bertha Clews Bond.
- 36/360 in Milton D. Garratt.
- 18/360 in Maria Lorenza Trussell.
- 18/360 in Estella Trussell Elizalde.

and defendants Charles N. Douglas and Ethel Tisdall Allen claim some right, title or interest therein.

VIII.

That subsequent to the commencement of this action and on the 25th day of July, 1946, defendants Title Insurance and Guaranty Company, Jerome J. Wilde and Mervyn Goodman acquired all of the right, title and interest of said owners in and to the land subject of this judgment and the right to compensate for the taking thereof, and that said defendants Title Insurance and Guaranty Company, Jerome J. Wilde and Mervyn Goodman are the only persons, firms or corporations entitled to compensation for the taking of the fee simple interest in said parcels of land, and that said defendants Title Insurance and Guaranty Company,

Jerome J. Wilde and Mervyn Goodman are the only persons, firms or corporations entitled to the payment for the annual use and occupancy of said lands from the aforesaid 25th day of July, 1946, until the vesting of the fee simple title to said parcels of land in plaintiff, and that defendants Clara P. Morton, Mary A. McLellan, William Thompson Garratt Allen, also known as William Garratt Allen, Mildred Morgan McLean, formerly Mildred Morgan, Henry Clay Bond, Maxwell W. Bond, Florence Eldredge Gross, formerly Florence Eldredge, Frederick W. Bond, Frederick W. Bond, Administrator of the Estate of Alice Eldredge, Deceased, Estella Trussell Elizalde, Charles Bosse, June Lenore Bosse Butterfield, formerly June Lenore Bosse, William Maxwell Bosse, Bertha Clews Bond, Milton D. Garratt, Maria Lorenza Trussell, Charles N. Douglas and Ethel Tisdall Allen are the only persons, firms or corporations entitled to the compensation to be paid for the use and occupation of the aforesaid parcels of land from the period July 25, 1942, up until July 25, 1946; that subsequent to the commencement of this action the aforesaid Jerome J. Wilde died and Edith A. Wilde was duly and regularly appointed Executrix of the Estate of said Jerome J. Wilde, and as such Executrix, was duly and regularly substituted as a defendant herein in the place and stead of Jerome J. Wilde, deceased.

IX.

That the parcels of land subject of this judgment

are situate in the City and County of San Francisco, State of California, and are more particularly described as follows:

Parcel 16—Commencing at the point of intersection of the northeasterly line of Quesada Avenue and the southeasterly line of Von Schmidt Street; running thence northeasterly and along said line of Von Schmidt Street 147 feet, 5½ inches, to the westerly line of Water Front Street; thence southerly along said line of Water Front Street 159 feet, 9 inches, to the northeasterly line of Quesada Avenue; thence northwesterly along said line of Quesada Avenue 62 feet, 6½ inches, to the point of commencement.

Being all of Block No. 716 Tide Lands.

Parcel 45—Commencing at the point of intersection of the northeasterly line of Revere Avenue and the southeasterly line of Von Schmidt Street; running thence northeasterly and along said line of Von Schmidt Street 200 feet to the southwesterly line of Quesada Avenue; thence at a right angle southeasterly along said line of Quesada Avenue 96 feet, 6 inches, to the westerly line of Water Front Street; thence southerly along said line of Water Front Street 217 feet, 3 inches, to the northeasterly line of Revere Avenue; thence northwesterly along said line of Revere Avenue 181 feet, 5 inches, to the point of commencement.

Being all of Block No. 726 Tide Lands.

Parcel 46—Commencing at the point of intersection of the northeasterly line of Shafter Avenue and the southeasterly line of Von Schmidt Street; running thence northeasterly and along said line of Von Schmidt Street 200 feet to the southwesterly line of Revere Avenue; thence at a right angle southeasterly along said line of Revere Avenue 215 feet, 41½ inches, to the westerly line of Water Front Street; thence southerly along said line of Water Front Street 217 feet, 3 inches, to the northeasterly line of Shafter Avenue; thence northwesterly along said line of Shafter Avenue 300 feet, 3 inches, to the point of commencement. Being all of Block No. 727 Tidelands.

Parcel 50—Commencing at the point of intersection of the southwesterly line of Revere Avenue and the southeasterly line of Alvord Street; running thence southeasterly and along said line of Revere Avenue 600 feet to the northwesterly line of Ship Street; thence at a right angle southwesterly along said line of Ship Street 200 feet to the northeasterly line of Shafter Avenue; thence at a right angle northwesterly along said line of Shafter Avenue 600 feet to the southeasterly line of Alvord Street; thence at a right angle northeasterly along said line of Alvord Street 200 feet to the point of commencement.

Being all of Block No. 731 Tide Lands.

Now, Therefore, by virtue of the verdict of the jury aforesaid, It Is Hereby Ordered, Adjudged

and Decreed that title to the land above described in Paragraph IX be deemed to be taken and condemned for the public use of the United States of America as authorized by law and will vest in the United States of America upon the depositing in the Registry of the Court of the sum of Four Thousand, Five Hundred, Ninety-six and $82/100$ Dollars (\$4,596.82), together with interest thereon as hereinafter set forth, free and discharged of all liens and claims of any kind whatsoever.

It Is Further Ordered, Adjudged and Decreed that the sum of Three Thousand, Two Hundred, Thirty-nine and $32/100$ Dollars (\$3,239.32) together with interest thereon at the rate of Five per cent (5%) from the 11th day of December, 1950, up until the date of the deposit of said sum in the Registry of this Court is hereby awarded to defendants Title Insurance Company, Edith A. Wilde Executrix of the Estate of Jerome J. Wilde, and Mervyn Goodman as full, adequate and just compensation for the taking and condemning of said Parcels 16, 45, 46 and 50 hereinabove described.

It Is Further Ordered, Adjudged and Decreed that the sum of Seven Hundred, Nine and $62/100$ Dollars (\$709.62) be and it is hereby awarded to defendants Title Insurance and Guaranty Company, Edith A. Wilde, Executrix of the Estate of Jerome J. Wilde, and Mervyn Goodman as full, adequate and just compensation for the exclusive use and occupancy of said Parcels 16, 45, 46 and 50, hereinabove described, for the period July 25, 1946, up until the 11th day of December, 1950.

It Is Further Ordered, Adjudged and Decreed that the sum of Six Hundred, Forty-seven and 88/100 Dollars (\$647.88) be and it is hereby awarded to defendants Clara P. Morton, Mary A. McLellan, William Thompson Garratt Allen, also known as William Garratt Allen, Mildred Morgan McLean, formerly Mildred Morgan, Henry Clay Bond, Maxwell W. Bond, Florence Eldredge Gross, formerly Florence Eldredge, Frederick W. Bond, Frederick W. Bond, Administrator of the Estate of Alice Eldredge, Deceased, Charles Bosse, June Lenore Bosse Butterfield, formerly June Lenore Bosse, Bertha Clews Bond, Milton D. Garratt, Maria Lorenza Trussell, Charles N. Douglas, Estella Trussell Elizalde and Ethel Tisdall Allen as full, adequate and just compensation for the exclusive use and occupancy of said Parcels 16, 45, 46 and 50, hereinabove described, for the period July 25, 1942, up until the 25th day of July, 1946.

It Is Further Ordered, Adjudged and Decreed that said sum of Three Thousand, Two Hundred, Thirty-nine and 32/100 Dollars (\$3,239.32), together with the interest due thereon as hereinabove set forth, be paid forthwith upon the deposit of such sum into the Registry of the Court to Title Insurance and Guaranty Company of San Francisco, California, which company has agreed to act as agent for defendants Title Insurance and Guaranty Company, Edith A. Wilde, Executrix of the Estate of Jerome J. Wilde, deceased, and Mervyn Goodman, without cost, to discharge any liens and encumbrances outstanding against the above-de-

scribed property and pay the balance remaining to said defendants Title Insurance and Guaranty Company, Edith A. Wilde, Executrix of the Estate of Jerome J. Wilde, deceased, and Mervyn Goodman.

It Is Further Ordered, Adjudged and Decreed that the sum of Six Hundred, Forty-seven and 88/100 Dollars (\$647.88) be paid to Title Insurance and Guaranty Company of San Francisco, California, which company has agreed to act as agent for defendants Clara P. Morton, Mary A. McLellan, William Thompson Garratt Allen, also known as William Garratt Allen, Mildred Morgan McLean, formerly Mildred Morgan, Henry Clay Bond, Maxwell W. Bond, Florence Eldredge Gross, formerly Florence Eldredge, Frederick W. Bond, Frederick W. Bond, Administrator of the Estate of Alice Eldredge, Deceased, Charles Bosse, June Lenore Bosse Butterfield, formerly June Lenore Bosse, William Maxwell Bosse, Bertha Clews Bond, Milton D. Garratt, Maria Lorenza Trussell, Estella Trussell Elizalde, Charles N. Douglas and Ethel Tisdall Allen, with cost, to discharge any liens and encumbrances outstanding against the above-described property and to pay the balance remaining to said defendants Clara P. Morton, Mary A. McLellan, William Thompson Garratt Allen, also known as William Garratt Allen, Mildred Morgan McLean, formerly Mildred Morgan, Henry Clay Bond, Maxwell W. Bond, Florence Eldredge Gross, formerly Florence Eldredge, Frederick W. Bond, Frederick W. Bond, Administrator of the Estate

of Alice Eldredge, Deceased, Charles Bosse, June Lenore Bosse Butterfield, formerly June Lenore Bosse, William Maxwell Bosse, Bertha Clews Bond, Milton D. Garratt, Maria Lorenza Trussell, Estella Trussell Elizalde, Charles N. Douglas and Ethel Tisdall Allen, or to their heirs, devisees or assignees.

Done in open Court this 9th day of February, 1951.

/s/ OLIVER J. CARTER,
Judge, United States District Court, Northern
District of California.

Service of a copy of the above Preliminary Judgment is hereby acknowledged this 18th day of January, 1951, but not approved as to form as provided by Rule 5(d).

/s/ FRANK A. RITHERS,
Attorney for
Other Defendants.

YOUNG, HUDSON &
RABINOWITZ,
SIMON AXITER,

By /s/ FRANK T. O'NEILL,
Attorneys for Estate of J. J. Wilde, Mervyn Goodman and Title Insurance and Guaranty Co.

[Lodged]: January 19, 1951.

[Entered]: Feb. 12, 1951.

[Endorsed]: Filed February 9, 1951.

[Title of District Court and Cause.]

ORDER AMENDING AND CORRECTING
JUDGMENT

The motion of plaintiff for an Order amending and correcting Judgment made and entered herein on the 9th day of February, 1951, insofar as it affects Parcels 16, 45, 46 and 50 as more particularly described in the pleadings on file herein, coming on regularly to be heard pursuant to Notice of Motion duly and regularly served upon defendants and each of them on the 3rd day of April, 1951, M. Mitchell Bourquin and George De Lew appearing in support of said Motion, and Young, Rabinowitz and Chouteau, and Frank T. O'Neill appearing in opposition thereto, and it appearing to the Court that by reason of clerical mistake and inadvertence the Judgment as entered does not correctly state the judgment of this Court;

Now, Therefore, It Is Hereby Ordered that the said Judgment and the record thereof be amended and entered as of February 9, 1951, nunc pro tunc in the following respects:

1. By striking therefrom the language appearing at lines 19 to 21, both inclusive, page 6 of said Judgment and inserting *the* lieu thereof the following: "It Is Further Ordered, Adjudged and Decreed that the sum of Three Thousand, Two Hundred, Thirty-nine and 32/100 Dollars (\$3,239.32), together with interest thereon at the rate of five per cent (5%) from the 11th day of December, 1950, up until the date of the deposit of said sum in the Registry of this Court is hereby";

2. By striking therefrom the language appear-

ing at lines 1 and 2, both inclusive, page 7 of said Judgment and inserting in lieu thereof the following: "It Is Further Ordered, Adjudged and Decreed that the sum of Six Hundred, Forty-seven and 88/100 Dollars (\$647.88) be and it is hereby awarded";

3. By striking therefrom the language appearing at lines 13 and 14, both inclusive, page 7 of said Judgment, and inserting in lieu thereof the following: "It Is Further Ordered, Adjudged and Decreed that said sum of Three Thousand Two Hundred, Thirty-nine and 32/100 Dollars (\$3,239.32), together with";

4. By striking therefrom the language appearing at lines 24 and 25, both inclusive, page 7 of said Judgment and inserting in lieu thereof the following: "It Is Further Ordered, Adjudged and Decreed that the sum of Six Hundred, Forty-seven and 88/100 Dollars (\$647.88) be paid to Title Insurance and Guaranty."

It Is Further Ordered* that the Clerk make on the original record of said Judgment a marginal reference to this Order and amendment.

Done in open Court this 6th day of April, 1951.

/s/ OLIVER J. CARTER,

Judge, United States District Court, Northern District of California.

[Endorsed]: Filed April 6, 1951.

*[Judgment as printed contains corrections as ordered in Order Amending and Correcting Judgment.]

[Title of District Court and Cause.]

MOTION TO AMEND AND
ALTER JUDGMENT

Now come the defendants, Title Insurance and Guaranty Company, a corporation; Edith A. Wilde, Administratrix of the Estate of Jerome J. Wilde, and Mervyn A. Goodman, and move this Court for an order amending and altering the judgment herein in accordance with the amendments to said judgment heretofore proposed by said defendants and filed herein, for the following reasons, viz.:

1. That said judgment does not conform to or with the verdict returned by the Jury herein.

This motion will be based upon this Notice and upon all the files and records in the above-entitled action.

YOUNG, RABINOWITZ &
CHOUTEAU,

SIMON ANIXTER,

/s/ FRANK T. O'NEILL,

Attorneys for

Said Defendants.

Receipt of copy acknowledged.

[Endorsed]: Filed February 19, 1951.

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the Southern Division of
the United States District Court for the Northern
District of California, held at the Court Room
thereof, in the City and County of San Francisco,
on Friday, the 2nd day of March, in the year of
our Lord one thousand, nine hundred and fifty-one.

Present: The Honorable Oliver J. Carter,
District Judge.

[Title of Cause.]

This case came on regularly this day for hearing
on motion to amend and alter judgment. After
hearing respective counsel, it is Ordered that said
motion be denied.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Title Insurance and
Guaranty Company, a corporation; Edith A. Wilde,
Administratrix of the Estate of Jerome J. Wilde,
Deceased, and Mervyn Goodman, the defendants
above named, hereby appeal to the United States
Court of Appeals for the Ninth Circuit from the
final judgment entered in this court on February
12, 1951, and as amended on April 6, 1951.

Dated this day of April, 1951.

YOUNG HUDSON,
RABWAY,

YOUNG, RABINOWITZ &
CHOUTEAU,

ALTMAN & ELLIS,

SIMON D. ANIXTER,

/s/ FRANK T. O'NEILL,
Attorneys for Appellants.

[Endorsed]: Filed April 28, 1951.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Whereas, Title Insurance & Guaranty Co., et al., has appealed to the United States Court of Appeals for the Ninth Circuit from the judgment entered against them in said action, in the United States District Court, in and for the Northern District of California, Southern Division.

Now, Therefore, in consideration of the premises, and of such appeal, the undersigned Maryland Casualty Company, a corporation, duly organized and existing under the laws of the State of Maryland, and duly authorized to transact a general surety business in the State of California, does

undertake and promises on the part of the appellants, to secure the payment of costs if the appeal is dismissed, or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, not exceeding the sum of Two Hundred, Fifty and No/100 (\$250.00) Dollars, to which amount it acknowledges itself bound.

It is expressly agreed by the Surety that in case of a breach of any condition hereof, the above-entitled Court, may upon notice to the Surety of not less than ten (10) days proceed summarily in the above-entitled action in which this bond is given, to ascertain the amount which the Surety is bound to pay on account of such breach and render judgment therefor against the Surety and award execution therefor, all as provided by and in accordance with the intent and meaning of Rule 34 of the Rules of Practice of the United States District Court in and for the Northern District of California.

In Witness Whereof, the corporate seal and name of the said Surety Company is hereto affixed and attested at San Francisco, California, by its duly authorized officer, this 6th day of April, 1951.

MARYLAND CASUALTY
COMPANY,

[Seal] By /s/ W. K. KELSO,
Attorney-in-Fact.

State of California,
City and County of San Francisco—ss:

On this 6th day of April, 1951, before me, A. McClintock, a Notary Public in and for the City and County of San Francisco, personally appeared W. G. Kelso, known to me to be the Attorney-in-Fact of the Maryland Casualty Company, the corporation described in and that executed the within instrument, and also known to me to be the person who executed it on behalf of the corporation therein named, and he acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal at my Office in the City and County of San Francisco the day and year in this Certificate first above written.

[Seal] /s/ A. McCLINTOCK,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission expires January 12, 1953.

[Endorsed]: Filed April 28, 1951.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET
RECORD ON APPEAL

The defendants, Title Insurance and Guaranty Company, a corporation; Edith A. Wilde, Administratrix of the Estate of Jerome J. Wilde, De-

ceased, and Mervyn Goodman, having filed herein, on the 28th day of April, 1951, a Notice of Appeal to the United States Court of Appeals for the Ninth Circuit from the judgment described in said Notice, and good cause appearing therefor,

It Is Ordered that the said defendants, and each of them, be and they are hereby allowed to have to and including the first of July, 1951, within which to docket in the United States Court of Appeals for the Ninth Circuit the record on such appeal.

Done in Open Court this 8th day of June, 1951.

/s/ OLIVER J. CARTER,
District Judge.

[Endorsed]: Filed June 8, 1951.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET
RECORD ON APPEAL

The defendants, Title Insurance and Guaranty Company, a corporation; Edith A. Wilde, Administratrix of the Estate of Jerome J. Wilde, Deceased, and Mervyn Goodman, having filed herein, on the 28th day of April, 1951, a Notice of Appeal to the United States Court of Appeals for the Ninth Circuit from the judgment described in said Notice, and good cause appearing therefor,

It Is Ordered that the said defendants, and each

of them, be and they are hereby allowed to have to and including the 20th day of July, 1951, within which to docket in the United States Court of Appeals for the Ninth Circuit the record on such appeal.

Done in Open Court this 2d day of July, 1951.

/s/ OLIVER J. CARTER,
District Judge.

[Endorsed]: Filed July 2, 1951.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

1. That the judgment entered herein on February 12, 1951, does not conform to or with the verdict of the jury returned and filed herein on December 13, 1950.

YOUNG, RABINOWITZ &
CHOUTEAU,

ALTMAN & ELLIS,

SIMON D. ANIXTER,

/s/ FRANK T. O'NEILL,

Attorneys for Defendant and
Appellants.

Service of copy acknowledged.

[Endorsed]: Filed July 6, 1951.

In the District Court of the United States for
the Northern District of California, Southern
Division

No. 22261

UNITED STATES OF AMERICA,

Plaintiff,

vs.

193 ACRES OF LAND IN THE CITY AND
COUNTY OF SAN FRANCISCO, STATE
OF CALIFORNIA; MATILDA PRIOR AN-
DREWS II, et al.,

Defendants.

Before: Hon. Oliver J. Carter,
Judge.

REPORTER'S TRANSCRIPT
PROCEEDINGS IN CHAMBERS

Wednesday, December 13, 1950

Appearances:

For the Plaintiff:

M. MITCHELL BOURQUIN, ESQ.,
Special Assistant to the Attorney
General, by

GEORGE DE LEW,
Special Attorney, and

J. HAROLD WEISE,
Special Attorney.

For the Defendants Goodman and Wilde and
Title Insurance and Guaranty Company:

FRANK O'NEILL, ESQ.

For Ethel Tisdale Allen, Maria Trussall, and
Charles N. Douglas:

YOUNG, HUDSON & RABINOWITZ,

and

ALTYMYER & ELLIS, by

FRANK RETHERS, ESQ.

Mr. De Lew: One short matter is defendant's instruction No. 12. That was ruled upon yesterday, one about the——

The Court: I am not giving that. I am going to give an instruction in its place and I will read it to you, same general type which I prepared myself. Says, in addition to a sum that you shall fix, the market value of the property at the time the Government took possession of the property, July 25, 1942, because you should award to the defendants, compensate them for the reasonable value of the use and occupation of the property by the Government from the 25th day of July, 1942, until the present.

Mr. De Lew: That is satisfactory.

The Court: That is what I am going to give in view of the ruling that I made yesterday.

Mr. O'Neill: That is entirely consistent.

The Court: It is consistent with the theory of the case. Actually not much conflict in the instruc-

tions given by both parties here, and I have taken these instructions and examined them so that—I have gone through to eliminate the ones that would duplicate one another and giving the instructions pretty nearly in accordance with the plaintiff's theory of the case, but there is no real conflict other than on that interest point.

I think I am giving about sixteen or seventeen instructions in all, special instructions, and the general instructions are instructions as to preponderance of the evidence, as to the credibility of witnesses. Now, I have taken your instructions on the expert witnesses; you gave no instructions on that.

Mr. O'Neill: No.

The Court: And I think there is one instruction of the plaintiff that I haven't given. I am going to give it in substance, but I haven't given it in the form—oh, as to plaintiff's No. 4, the language of this instruction, the last sentence,

“If, therefore, in your opinion, the testimony on this question is evenly balanced the defendants must be deemed to have failed in respect thereto,”

I am going to instruct on that subject this way: I am going to say that this being a condemnation action the defendants have the burden of proof and must prove the amount of compensation to which they are entitled to by a preponderance of the evidence. Going on and say preponderance of the evidence is meant such evidence as when weighed with that opposed to it has more convincing force

and from which it results that the greater probability is in favor of the party upon whom the burden rests.

When we speak of the burden of proof and preponderance of the evidence we are not referring necessarily to the number of witnesses who testify on one side or the other. We are referring to the evidence which, when weighed to that opposed to it, is more convincing in your mind.

And then go on: We are concerned with the quality rather than quantity and not bound to rely upon any number of witnesses against a single witness who produces more conviction in your mind. I think this is a broader coverage of the subject, covers it the same way.

I find that when you say the defendant or the plaintiff has failed in a certain point that may create a prejudice in the jurors' minds, or an inference in the jurors' minds that you are tying on to a certain party. Actually preponderance of evidence is determined from the whole evidence in the case, and I don't like to tie it to plaintiff's or defendant's case.

Mr. O'Neill: Satisfactory.

Mr. De Lew: Yes.

The Court: I think that will cover substantially—I am giving most of the plaintiff's instructions, among them general market value and the uses to which the property can be put, those sort of things. And the defendant's instructions I have given some, for instance, I used the defendant's instruction on the constitution, which refers to the condemnation

as being just compensation, and then I am giving the classic definition of market value that you set forth, but it follows—the definition that is set forth in this instruction may be more than is necessary on that, but I thought that they would want a definition.

Then I am giving the defendant's proposed instruction Number 6 as to the sales, other like sales should be used when determining the question of valuation.

And then I am giving the Court's instruction of use and occupation of the property. I think otherwise the plaintiff's instructions have covered the field which you have covered, so it won't take very long to instruct.

Now, I want to take up this verdict. Have you seen the form of the verdict, Mr. O'Neill?

Mr. O'Neill: Yes.

The Court: Is that satisfactory to you, that form of verdict?

Mr. O'Neill: I think so, yes, your Honor.

The Court: It covers the range.

Mr. De Lew: Only one thought I have, Judge,—

The Court: I know it doesn't total 204,000 square feet.

Mr. O'Neill: 68 feet.

Mr. De Lew: 68 feet shy. Also, if it is all right, throw it off parcel 46. It doesn't make any difference.

The Court: Let us leave it as it is.

Mr. O'Neill: It isn't worthwhile changing it, George.

Mr. De Lew: All right.

Mr. O'Neill: Be two and a half, or something.

Mr. De Lew: All right.

The Court: We have stipulated to 204,000 square feet.

Mr. O'Neill: Yes, I have the stipulation.

The Court: I think I will mention when I read the form of instructions to them I will say it is 68 feet less than 204,000 as an actual fact, and in spite of the stipulation that has been entered in Court, and here set forth the exact amount. You have no objections to that, Mr. O'Neill?

Mr. O'Neill: No.

The Court: In effect it will be modifying the stipulation we made so far, but it will be exact and——

Mr. O'Neill: Do you want to give any instructions in regard to making their computation?

The Court: All the testimony we have here as to value has been on so much a square foot, so they can make their own computation. All right, then.

Mr. O'Neill: Any possibility that they would be confused? We, the jury, find the fair market value and is the sum of per square foot.

Mr. De Lew: Want a total amount?

The Court: Going to instruct—I am going to take the form of verdict up with them and instruct them that they should put a sum of money that is—which is the total sum of money opposite each

spot there, opposite each blank to write the market value, to make the computation.

Mr. O'Neill: To make it on the basis of so much a square foot.

The Court: Figure it out any basis they want to.

Mr. O'Neill: Supposing they would put in here four cents?

The Court: Suppose it was four cents and inadvertently they just write four cents? I am going to tell them to make the computation, a determination of so much a square foot, then to make the calculation.

Mr. De Lew: There is an engineer among them—an engineer. He wouldn't be tangled up. We have the square feet there.

(End of the proceedings had in Chammers.)

Wednesday, December 13, 1950

INSTRUCTIONS TO THE JURY

The Court: Ladies and gentlemen of the jury, the presentation of the evidence in this case has been concluded. You have listened to the arguments of respective counsel. Let me say to you first of all that it is your exclusive province to judge the facts in this case; it is the exclusive function of the Court to instruct you as to the applicable law, and in turn you will apply this law to the facts. I express no opinion as to the facts or the evidence, nor do I wish you to understand or conclude from anything I may have said during the trial or during the course of the instructions that I have intended,

directly or indirectly, to indicate any opinion on my part as to the facts or as to what I may think your findings should be.

Now, you will recall that during the course of the trial of this case and from time to time the Court made rulings excluding some evidence, admitting other evidence, and at times the Court interrogated the witnesses himself. From that you should not draw any conclusion that the Court was intending to indicate the opinion of the Court as to the facts or the evidence in this case. What the Court did in those respects was in furtherance of the Court to supervise the trial of the case and to expedite it, and it was for those reasons only and for none other. While it is your duty and function to decide the facts, it is my duty to instruct you as to the law applicable to the facts. I therefore instruct you that you should disregard any preconceived ideas or belief you may have as to what the law is or should be in this case. You should accept the instructions of this Court as to the law without any question so that you can properly determine the facts from the evidence which has been submitted in this case.

In considering the testimony of witnesses who appeared in this case there are certain general rules of law that apply to all types of civil cases which should be of assistance to you in arriving at a decision in this case.

Now, I used the term "civil case" here. This is an action in condemnation and it is in nature generally classified as a civil case. These general rules

apply to all witnesses. A witness is presumed to speak the truth, but this presumption may be negatived by the manner in which he testifies, by his motives, or by evidence to his character or reputation for truth, honesty and integrity. In passing upon the credibility of the various witnesses, it is your right to accept the whole or any part of their testimony, or discard and reject the whole or any part thereof. If it is shown the witness has testified falsely on any material matter, you should distrust his testimony in other particulars, and in that event you are free to reject all of the witness' testimony.

This being a condemnation action, the defendants have the burden of proof and must prove the amount of compensation to which they are entitled, by which is known as a preponderance of the evidence. Preponderance of the evidence is meant such evidence as when weighed with that opposed to it has more convincing force and from which it results that the greater probability is in favor of the party upon whom the burden rests.

When we speak of the burden of proof and preponderance of the evidence we are not necessarily referring to the number of witnesses who testify on one side or the other. We are referring to the evidence which, when weighed to that opposed to it, is more convincing in your mind. In other words, we are concerned with the quality rather than the quantity of the evidence. In this respect you are not bound to decide in conformity with the testimony of a number of witnesses which do not produce conviction in your mind as against the

declaration of a lesser number of witnesses or the presentation of other evidence which appeals to your mind with more convincing force.

In determining the preponderance of the evidence it is your duty to scrutinize carefully the testimony given and in so doing consider the following: the circumstances under which the witness testifies, his or her demeanor on the stand, his or her intelligence, the connection or relationship which he or she bears to either party, the manner in which he or she might be affected by the verdict, the extent to which he or she is contradicted or corroborated by other evidence, if at all, and any other matter which reasonably sheds light upon the credibility of the witness.

You must disregard entirely testimony stricken out by the Court or any testimony to which an objection has been sustained. The attorneys in their argument have commented and argued upon the facts. If you find any variance between the facts as testified to by the witnesses and what has been stated to you by counsel to be the facts, to the extent of such variance, you must consider the facts only as testified by the witnesses.

In your consideration of the evidence and in all of your deliberations in this case, you must wholly exclude any sympathy or prejudice from your minds. In this respect you should not be influenced or affected by the fact that in this case one of the parties is the Government and the other parties are private citizens and landowners, and you should not be influenced in any way by the relative position of

the parties to this litigation. This case is to be considered and determined by you in the same unbiased way as you should consider and determine a case between two private individuals.

Now, there are some special instructions that should be given in a condemnation action of this kind, and I might preface them by saying that your appointed function here is to determine the compensation to which these defendants are entitled, by reason of the taking of their property through condemnation by the Government, and these instructions go generally to that proposition. I might say further before I get into the special instructions that there are two general items of compensation to be considered here. One is the market value of the property at the time the Government took possession which, I believe, was July 25, 1942; the other item of compensation is the reasonable value, or the value of the use and occupation of the property by the Government from the time it did take possession on July 25, 1942, until the present time. Those are the two major items of compensation that you are to compute in this case and you are to make an award in favor of the defendants, and you should do so in accordance with these instructions as I shall give them to you.

This is a condemnation proceeding commenced by the United States of America against the defendants for the purpose of taking and acquiring the property in the City and County of San Francisco, and described in the complaint, for the use of the United States Navy.

The Fifth Amendment of the Constitution of the United States provides that private property shall not be taken for public use without just compensation. Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken.

In proceedings for the condemnation of land, the market value thereof as of the date when taken is the measure of damages. In this action the Government took possession of the land on July 25, 1942. The phrase "market value" is synonymous with "actual value." In determining market value, the test is not value for a special purpose, but fair value in view of all the purposes to which the property is naturally adapted. Market value is the highest value in terms of money which the land will bring if exposed to sale for cash in the open market in the community in which situated, with a reasonable time to find a purchaser, buying with full knowledge of all the uses and purposes to which it is adapted, and for which it is capable of being used, and the seller is not required to sell or the buyer required to buy.

The classic definition, "market value," is fixed as the "highest price estimated in terms of money which the land would bring if exposed for sale in the open market with reasonable time allowed in which to find a purchaser, buying with knowledge of the uses and purposes to which it was adapted for which it was capable." This market value may

be greater or less than the value in use to either the owner of the condemnor, but in the eyes of the law it is a fixed amount determined by "the highest sum which the property is worth to persons generally, purchasing in the open market in consideration of the land's adaptability for any proven use."

What the owner is entitled to is the value of the property taken, and that is what it is fairly believed a purchaser in fair market conditions would have given for it in fact—what a purchaser who is not compelled to buy would pay under ordinary circumstances to a seller who is not compelled to sell—but the owner is not entitled to have damages based upon a plan of improvement that is speculative and fanciful.

It would be unjust to the public that the United States should be required to pay the defendants more than the fair market value of the property appropriated for the public use.

In arriving at the market value you are not to consider what the property was worth to the Government, for to allow that element to enter into your deliberations would be to make the Government's necessity—the owner's opportunity. In other words, neither need for selling nor need for purchasing should be considered. It is what the defendant could have obtained for the property if it had been offered for sale in the market—a reasonable time being given within which to make the sale.

It is the condition of the property at the time it was taken and before any improvement and ex-

penditure thereon by the Government that you must consider in determining its fair market value.

The location, physical characteristics, advantages and disadvantages of land subject of condemnation are proper matters to be shown in evidence in determination of its market value. These are matters which would naturally be taken into calculation in forming a public and general estimate of the value of property and influence the minds of sellers and buyers with relation thereto, and accordingly the Court instructs you that to the extent that such matters are shown by the evidence the jury may properly consider the same in arriving at its conclusion of the just compensation to be paid.

You are not to consider what the property was worth to the defendants, for speculation or merely for possible usage, nor what the defendants claim it was worth to them, nor what it may be worth to the Government for a defense project. You are not to consider the price the property would sell for under special or extraordinary circumstances, but its fair market value if offered in the market under ordinary circumstances for cash, a reasonable time being given to make the sale.

An estimate of value based upon the special adaptation of the land condemned for a particular purpose is not warranted in the absence of evidence to show or from which can be inferred a reasonable expectation of some demand at some time for use of the land for such purposes. In this connection I instruct you that the Government's wartime necessity for the development of the property for a

particular purpose standing alone cannot be considered in estimating the value of the property taken.

Whatever purpose the defendants or any of them may have had in connection with the future use of the property can add nothing to its market value. The fact that this purpose may have been defeated by condemnation, however, such a disappointment, is not a matter of compensation.

A use existing or contemplated on property is distinct from the market value of the property itself and is not the conclusive basis for fixing such market value, and, standing alone, is not to be considered as determining the value of the property. Value in use is not to be considered by you as determining the market value of the property.

You should not concern yourselves at all with the question of whether or not any individual owner was willing to part with his property or wanted to sell, or even that he may have desired to retain it for or because of its adaptability to some planned use of his own. Condemnation is the substitute for the willingness of the owner to sell and in resolving the market value you must deal with the properties in suit just as if each was being offered for sale. It is the fair cash market value and not the value of the property to the owner or to the Government that you are to determine.

Sales of other properties admitted in evidence should be considered by you, insofar as such sales, looking at the circumstances, in each instance, may evidence or throw light upon the fair market value of the land being condemned, unaffected by the

Government's acquisition thereof for public purposes.

Now, in addition to any sum that you shall fix as the market value of the property as of the time the Government took possession of the property on July 25, 1942, you should also award to the defendants a sum of money which will compensate them for the reasonable value of the use and occupation of the property by the Government from the 25th day of July, 1942, to the present time.

While it is essential in the nature of the issues to be submitted to you, the testimony thereon be given through experts as to value and extent of damages, you are not required passively to accept the opinions of such experts in arriving at your verdict, but you should weigh and judge of such opinions in view of all the testimony in the case, and your own general knowledge of affairs.

The opinion of a witness as to the market value of property may be good or bad or indifferent, depending on how well qualified or how earnest the witness may be to express such an opinion. You are not bound to accept the opinion of any witness as to the market value of this property, but must determine the fact for yourselves, and in so doing it is your province to weigh the testimony of each witness who has expressed such an opinion with reference to all the circumstances surrounding not only the property itself, but the familiarity of the witness with such property, and to determine from all such circumstances how well qualified the witness may be to express a true opinion of its market

value, and you may, in your discretion, reject the testimony of any witness who has expressed such an opinion if it appears to your satisfaction that such an opinion is not based upon such a thorough knowledge of all facts and circumstances relating to the property, or which you believe has been formed and expressed with disregard for the proven facts and circumstances of the property in question.

In weighing the evidence in estimating the market value of the property, the jurors are permitted to exercise their own individual judgment as to the values, upon subjects within their own knowledge, which they have acquired through experience and observation.

Ladies and gentlemen, if you can conscientiously do so, you are expected to agree upon a verdict. You should freely consult with one another in the jury room. If any of you should be convinced that your view of the case is erroneous, do not be stubborn and do not hesitate to abandon your own view under such circumstances. On the other hand, it is entirely proper for you to adhere to your own view, if, after a full exchange of ideas, you still believe you are right.

If you should find in favor of defendant in this case, you should not, in arriving at the amount of your verdict, resort to the so-called pooling plan or scheme. That scheme is for each juror to write down the amount he or she thinks should be awarded, then add up the total and divide by twelve, and thus fix the amount of the verdict. Your verdict should be based upon the evidence and not upon chance.

I might say here that you should not resort to the plan of averaging the values testified to by the respective witnesses, and in saying that I don't mean you have to find in conformity with any one particular witness as to values, but don't do it by an averaging or a mathematical calculation plan of averaging what the witnesses have testified. You do it upon your own considerations, although you may have to use mathematical calculations to do that.

The Court finally cautions you that if it becomes necessary for the jury to communicate with the Court during its deliberations, or upon its return to the Court, respecting any matter, connected with the trial of this case, you should not indicate to the Court in any manner how the jury stands numerically or otherwise on the issues submitted. This caution the jury should observe at all times after the case is submitted to it and until the jury has reached a verdict.

Whenever you agree upon a verdict it is the verdict of the jury. In other words, your verdict must be unanimous in this Court. When you retire to the jury room to deliberate, you will select one of your number as foreman or forelady, and he or she will sign your verdict for you when it has been agreed upon, and he or she will represent you as your spokesman in the further conduct of this cause in this Court, and if you have any communication to make to the Court you do it through the attaches of the Court. You will be in the care of a deputy

marshal and you can communicate to him and he can communicate to the Court.

We have prepared a form of verdict for you, and it is rather lengthy. I am going to read it to you and point out one minor divergence from a stipulation that has been previously made. I might say by way of prefacing that, counsel stipulated here that the total square footage of all four parcels was 204,000 square feet. The actual square footage is 68 square feet less than that total, and in the verdict here, in the form of verdict, each parcel has been listed with the exact number of square feet as shown in the pleadings, and the stipulation as to the total of 204,000 square feet is modified to the extent of the 68 square feet difference.

And then the verdict, after setting up the square footage for parcels 16, 45, 46 and 50, reads as follows:

“We, the jury, find that the fair market value of Parcel 16, containing 4,611 square feet, is the sum of dollars.”

Now, after that blank, you should fill in a sum of money which you determine to be the fair market value of that property as of the date of the taking of possession by the Government. The verdict should be in the sum of money in an amount per square foot. You should make the calculation yourselves for the total sum of money.

Then the verdict further reads:

“We, the jury, find the fair market value of the annual use of Parcel 16 is the sum of dollars.”

And again you should put a sum of money which is the value of the use for the period of time from July 25, 1942, to the present time, and you don't put so much a square foot a year; we want it in—it should be in a sum of money; that is a calculation for you to make.

Now, then, you have two findings in the same form for Parcel 45, and you have two findings in the same form for Parcel 46, and two findings in the same form for Parcel 50, and in each one the square footage of the property is different so that you will have to make the calculation in each case, and in respect to each parcel you will make the findings in an amount: (1) as the fair market value as of the date of the taking; (2) the value of the use and occupation referred to here, the fair market value of the annual use.

Now, that doesn't mean for one year, that means for the whole time. When they talk about the annual use they are talking about the annual use for the period of time from July 25, 1942, to the present time.

Now, Mr. Clerk, will you deliver the verdict to the jury, and ladies and gentlemen of the jury you will retire after the officers who will have you in their care and custody are sworn. Will you swear the officers, Mr. Clerk?

(Officers sworn.)

The Court: Mr. Marshal, will you take the jury to the jury room?

(12:05 p.m. Jury in the box.)

The Court: I might say for the record that a question has been directed to the Court concerning the verdict.

Mr. Foreman, am I correct in assuming that your question is that you want to know what the meaning of "Annual Use" is, what period of time that covers, is that correct?

The Foreman: That is right, your Honor. As it is typed here in the verdict it says, "We, the jury, find that the fair market value of the annual use of the various parcels is the sum of". We understood you to say that we were to put in a lump sum, but we didn't think your typed statement indicated that.

The Court: That is right. I referred to that particularly and explained it, but I will explain it again so that you may be sure. That portion as to each parcel that you are referring to refers to the period of time from July 25, 1942, until the present time.

The Foreman: Yes.

The Court: But there it is termed the annual—you are to determine upon an annual value for the use and occupation times the number of years that are involved, so it will be a lump sum for the total period for the annual use and occupation. In other words, the annual use and occupation would be the use and occupation for one year times the number of years involved. You then determine the lump sum. Is that clear?

The Foreman: Your explanation is clear, sir, but——

The Court: Well, the verdict will be interpreted in the light of the instructions. The term “Annual Use” is a term that refers to the use and occupation on an annual basis, but it is for the total period of time. Now, Counsel, that is the sense of the verdict as it was discussed this morning, is it not?

Mr. De Lew: Your Honor, I just thought, if it would make it any simpler, just put it on the one year basis and we could compute it.

The Court: I think it should be in a lump sum. You should compute the lump sum and compute it for the total number of years, even though you may determine it on an annual basis.

The Foreman: It will be understood that the value we put on the verdict is for the total time.

The Court: That is right.

The Foreman: Regardless of how we figure it.

The Court: That is right, that is your privilege to compute.

The Foreman: That didn't appear to be what the verdict shows.

The Court: The verdict itself may be ambiguous in its language, but that is the interpretation we have put on it, that is the method you are to follow.

The Foreman: That answers our questions.

The Court: You may retire for further deliberation.

(Court at recess.)

Certificate of Reporter

I, Official Reporter and Official Reporter pro tem, certify that the foregoing transcript of 23 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ RUSSELL D. NORTON.

[Endorsed]: Filed July 16, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents, listed below, are the originals filed in this Court, or true copies of orders entered in this Court, in the above-entitled case, and that they constitute the record on appeal as designated by the attorneys herein:

Verdict.

Preliminary Judgment as to Parcels 16, 45, 46 and 50.

Order amending and correcting judgment.

Motion to amend and alter judgment.

Order denying motion to amend and alter judgment.

Notice of appeal.

Cost bond on appeal.

Statement of points on appeal.

Order extending time to docket record on appeal,
filed June 8, 1951.

Order extending time to docket record on appeal,
filed July 2, 1951.

Appellants' designation of record on appeal.

Appellee's designation of record on appeal.

Reporter's transcript, December 13, 1950.

In Witness Whereof I have hereunto set my hand
and affixed the seal of said District Court this 17th
day of July, 1951.

[Seal] C. W. CALBREATH,
 Clerk,

By /s/ C. M. TAYLOR,
 Deputy Clerk.

[Endorsed]: No. 13015. United States Court of
Appeals for the Ninth Circuit. Title Insurance and
Guaranty Company, a Corporation; Edith A. Wilde,
Administratrix of the Estate of Jerome J. Wilde,
Deceased, and Mervyn Goodman, Appellants, vs.
United States of America, Appellee. Transcript of
Record. Appeal from the United States District
Court for the Northern District of California,
Southern Division.

Filed July 17, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Circuit Court of Appeals
In and for the Ninth Circuit

No. 13015

UNITED STATES OF AMERICA,

Plaintiff and Appellee,

vs.

193 ACRES OF LAND IN THE CITY AND
COUNTY OF SAN FRANCISCO, STATE
OF CALIFORNIA; MATILDA PRIOR AN-
DREWS II, TITLE INSURANCE AND
GUARANTY COMPANY, a Corporation;
EDITH A. WILDE, Administratrix of the
Estate of JEROME J. WILDE, Deceased, and
MERVYN GOODMAN, et al.,

Defendants and Appellants.

STATEMENT OF POINTS AND DESIGNA-
TION OF RECORD FOR PRINTING

Comes now the appellants, Title Insurance and Guaranty Company, a corporation; Edith A. Wilde, Administratrix of the Estate of Jerome J. Wilde, Deceased, and Mervyn Goodman, in the above-entitled cause, and hereby adopt as its and their statement of points on appeal on which it and they intend to rely on this appeal, the statement of points on appeal as it now appears in the transcript of the record herein.

Appellants hereby designate for printing the entire certified transcript of the record.

ALTMAN AND ELLIS,
SIMON D. ANIXTER,
YOUNG, RABINOWITZ &
CHOUTEAU,

/s/ FRANK T. O'NEILL,
Attorneys for Defendants and
Appellants.

Receipt of copy acknowledged.

[Endorsed]: Filed July 27, 1951.

No. 13,015

IN THE

United States Court of Appeals
For the Ninth Circuit

TITLE INSURANCE AND GUARANTY COMPANY (a corporation); EDITH A. WILDE, Administratrix of the Estate of Jerome J. Wilde, Deceased, and MERVYN GOODMAN,

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court, Northern
District of California, Southern Division.

APPELLANTS' OPENING BRIEF.

YOUNG, RABINOWITZ & CHOUTEAU,
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605 Market Street, San Francisco 5, California,

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No. 13,015

IN THE

**United States Court of Appeals
For the Ninth Circuit**

TITLE INSURANCE AND GUARANTY COM-
PANY (a corporation); EDITH A.
WILDE, Administratrix of the Estate
of Jerome J. Wilde, Deceased, and
MERVYN GOODMAN,

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court, Northern
District of California, Southern Division.

APPELLANTS' OPENING BRIEF.

JURISDICTION.

This action (in condemnation) was instituted in the District Court of the United States, for the Northern District of California, Southern Division, pursuant to the provisions of the Act of Congress approved January 29, 1942 (Public Law 420, 77th Congress, 56 Stat., Chapter 25), and the Act of Congress approved

February 7, 1942 (Public Law 441, 77th Congress, 56 Stat. Chapter 46), appropriating funds therefor.

The judgment from which this appeal is taken was entered on February 12, 1951 (Tr. p. 16), upon the verdict of a jury returned on December 13, 1950 (Tr. p. 4). A motion to amend and alter said judgment was made and filed on February 19, 1951 (Tr. p. 19). Such motion was denied on March 2, 1951 (Tr. p. 20). Notice of appeal from said judgment was filed April 28, 1951 (Tr. pp. 20, 21). Orders extending the time to docket the record on appeal to the 20th day of July, 1951, were duly made (Tr. pp. 23, 24, 25). The record on appeal was filed herein on July 17, 1951 (Tr. p. 49).

The jurisdiction of this court to entertain this appeal lies in United States Code Title 28, Section 1291.

STATEMENT OF THE CASE.

This action was brought by the United States of America to condemn various parcels of land situated in the City and County of San Francisco, State of California, four of which are involved in the judgment from which this appeal is taken (Tr. pp. 10, 11, 12).

The complaint was filed July 25, 1942 and plaintiff went into possession of the said four parcels of land on said day and remained in the exclusive possession and control thereof up to and including the time of trial (Tr. p. 7). The cause was tried before

a jury which returned its verdict fixing the fair market value of the property in question as well as fixing the fair market value of its use and occupancy by the plaintiff (Tr. pp. 3, 4).

SPECIFICATION OF ERROR.

The judgment entered by the trial court does not conform to or with the verdict of the jury (Tr. p. 25).

The jury returned its verdict (in so far as it related to the value of the use of the property), as follows:

“We, the jury find that the fair market value of the *annual* (italics ours) use of Parcel No. 16 is the sum of \$20.00.”

“We, the jury find that the fair market value of the *annual* (italics ours) use of Parcel No. 45 is the sum of \$125.00.”

“We, the jury find that the fair market value of the *annual* (italics ours) use of Parcel No. 46, is the sum of \$232.50.”

“We, the jury find that the fair market value of the *annual* (italics ours) use of Parcel No. 50 is the sum of \$980.00.”

The trial court fixed the damages sustained by defendants resulting from the use and occupancy of the property by the plaintiff from the time that plaintiff took possession thereof to-wit: July 25, 1942 (Tr. p. 7) until the time that the jury returned its verdict to-wit: December 13, 1950 (Tr. p. 4) in the same

amount fixed by the jury for the *annual* use and occupancy of the property (Tr. p. 6).

It is fairly obvious that the judgment in question does not conform to or with the verdict which in fact the jury returned. It is plain and unambiguous and speaks for itself.

ARGUMENT.

We will not dwell at any great length upon the Constitutional guaranty of the right to trial by jury. In the hearts and minds of many it is one of the most cherished of all Constitutional rights. Once a verdict has been returned, the court is conclusively bound by it, unless it has express statutory authority to change or modify it.

Nor will we burden this court with the citation of the numerous cases, under varying conditions, in which the right has been jealously upheld. Two of them will suffice to explain our position.

The case of *Mutual Benefit Health and Accident Assn. v. Thomas*, 123 Fed. (2d) 352 (Eighth Circuit) was an action upon a policy of insurance which provided indemnity for accident and sickness disability. Upon trial, a jury returned a nominal verdict in favor of plaintiff. Later upon motion of plaintiff, a judgment was entered by the court substantially in excess of the amount fixed by the jury. In commenting upon the propriety of the trial court's action, the Court of Appeals said at page 356:

“We think the Seventh Amendment denied to the court the power to increase the amount of the verdict in the instant case. This is not a case where the court denied a motion for a new trial on condition that plaintiff remit a portion of an excessive verdict, but a clear case of a change of the verdict of the jury. Except for such unusual cases, and the case of reservation of decision on motion for a directed verdict as provided by Rule 50 of the Rules of Civil Procedure, or the granting of a new trial, the verdict of the jury must be accepted as conclusive.”

It should be borne in mind that plaintiff made no motion of any character before the trial court and in the light of the foregoing rule, that court was without any jurisdiction to change or modify the verdict and was bound to enter a judgment in accordance therewith.

If the appellee seeks to make objections to the form of the verdict, or that it was not in accordance with the instructions of the court, appropriate objections should have been taken in the court below as indicated by the case of *Reidy v. Myntti*, 116 Fed. (2d) 725 (Ninth Circuit). That case involved the payment of disputed mining royalties. There the trial court instructed the jury (p. 731) as follows:

“If, * * * you find that the ground mined by the defendants during the year 1937 was a part of said leased premises, you should ascertain, by a preponderance of the evidence, the value of the gold dust, and so forth, mined and recovered from said leased premises by the defendants during the

year 1937, and you should find in favor of the plaintiff for 121½% of said value, *together with interest thereon at the rate of six per cent per annum from the close of the mining season of 1937.*" (Emphasis supplied.)

A verdict was returned by the jury (p. 726) as follows:

"We, the Jury * * * do, from the law and evidence therein, find in favor of the plaintiff and against the defendant on the issues joined herein and that there is owing to the plaintiff from the defendants the sum of \$9,375.00, plus \$300.00 withheld, for royalty from mining operations during the years of 1936 and 1937, together with interest thereon."

The judgment entered by the trial court included interest only from the date of the judgment. In affirming the judgment the court held at page 731:

"The question of the sufficiency of the jury's verdict was not raised by the plaintiff until the trial court had discharged the jury. Counsel did not request that the jury make the verdict more definite. The judgment of the Court is in conformity with the verdict as rendered. If counsel for the plaintiff wishes to question the verdict, as conforming to the Court's instructions, he should have raised that question at the time of its rendition.

Plaintiff has cited us no cases, and our research fails to disclose any, authorizing the trial court or the appellate court to correct or add to a verdict after the jury is discharged."

It is respectfully submitted that the judgment should be reversed and the trial court be directed to enter a judgment in accordance with the verdict.

Dated, San Francisco, California,
September 14, 1951.

YOUNG, RABINOWITZ & CHOUTEAU,
FRANK T. O'NEILL,
ALTMAN & ELLIS,
SIMON D. ANIXTER,
Attorneys for Appellants.

No. 13,015

**In the United States Court of Appeals
for the Ninth Circuit**

TITLE INSURANCE AND GUARANTY COMPANY, A CORPORATION;
EDITH A. WILDE, ADMINISTRATRIX OF THE ESTATE OF
JEROME J. WILDE, DECEASED, AND MERVYN GOODMAN,
APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

BRIEF FOR THE UNITED STATES

J. EDWARD WILLIAMS,

Acting Assistant Attorney General.

M. MITCHELL BOURQUIN,

*Special Assistant to the Attorney General,
San Francisco, California.*

JOHN F. COTTER,

*Attorney, Department of Justice,
Washington, D. C.*

FILED

OCT 17 1951

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(I)

In the United States Court of Appeals for the Ninth Circuit

No. 13,015

TITLE INSURANCE AND GUARANTY COMPANY, A CORPORATION; EDITH A. WILDE, ADMINISTRATRIX OF THE ESTATE OF JEROME J. WILDE, DECEASED, AND MERVYN GOODMAN, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

*UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION*

BRIEF FOR THE UNITED STATES

OPINION BELOW

The district court did not write an opinion.

JURISDICTION

This is an appeal from a judgment entered February 9, 1951 (R. 5-16) as amended April 6, 1951 (R. 17-19). Notice of appeal was filed April 28, 1951 (R. 20-21). The jurisdiction of this Court is invoked under 28 U. S. C. sec. 1291.

QUESTION PRESENTED

Whether in awarding compensation for use and occupation of the condemned property from July

25, 1942, to December 13, 1950, the judgment conforms to the verdict of the jury.

STATEMENT

On July 25, 1942, the United States filed its petition to condemn the lands here involved, Parcels 16, 45, 46 and 50. At that time it entered into exclusive possession and control. The case came on for trial on December 11, 1950. On December 13, 1950, the court instructed the jury (R. 32-45). He concluded his instructions as follows (R. 44-45):

We have prepared a form of verdict for you, and it is rather lengthy. I am going to read it to you * * *.

And then the verdict, after setting up the square footage for parcels 16, 45, 46 and 50, reads as follows:

"We, the jury, find that the fair market value of Parcel 16, containing 4,611 square feet, is the sum of ----- dollars."

Now, after that blank, you should fill in a sum of money which you determine to be the fair market value of that property as of the date of the taking of possession by the Government. * * *

Then the verdict further reads:

"We, the jury, find the fair market value of the annual use of Parcel 16 is the sum of ----- dollars."

And again you should put a sum of money which is the value of the use for the period of time from July 25, 1942, to the present time * * *.

Now, then, you have two findings in the same form for Parcel 45, and you have two findings

in the same form for Parcel 46, and two findings in the same form for Parcel 50, and in each one the square footage of the property is different so that you will have to make the calculation in each case, and in respect to each parcel you will make the findings in an amount: (1) as the fair market value as of the date of the taking; (2) the value of the use and occupation referred to here, the fair market value of the annual use.

Now, that doesn't mean for one year, that means for the whole time. When they talk about the annual use they are talking about the annual use for the period of time from July 25, 1942, to the present time. [Emphasis added.]

The jury, however, was in some doubt as to the meaning of the second part of the verdict and returned for further instructions. Thereupon, there occurred the following (R. 46-47):

The COURT. * * * Mr. Foreman, am I correct in assuming that your question is that you want to know what the meaning of "Annual Use" is, what period of time that covers, is that correct?

The FOREMAN. That is right, your Honor. As it is typed here in the verdict it says, "We, the jury, find that the fair market value of the annual use of the various parcels is the sum of-----." We understood you to say that we were to put in a lump sum, but we didn't think your typed statement indicated that.

The COURT. That is right. I referred to that particularly and explained it, but I will explain

it again so that you may be sure. That portion as to each parcel that you are referring to refers to the period of the time from July 25, 1942, until the present time.

The FOREMAN. Yes.

The COURT. * * * you are to determine upon an annual value for the use and occupation times the number of years that are involved, so it will be a lump sum for the total period for the annual use and occupation. In other words, the annual use and occupation would be the use and occupation for one year times the number of years involved. You then determine the lump sum. Is that clear?

The FOREMAN. Your explanation is clear, sir, but—

The COURT. Well, the verdict will be interpreted in the light of the instructions. The term "Annual Use" is a term that refers to the use and occupation on an annual basis, but it is for the total period of time.

* * * * *

The FOREMAN. It will be understood that the value we put on the verdict is for the total time.

The COURT. That is right.

* * * * *

The FOREMAN. That didn't appear to be what the verdict shows.

The COURT. The verdict itself may be ambiguous in its language, but that is the interpretation we have put on it, that is the method you are to follow.

The FOREMAN. That answers our questions.

The same day the jury returned a verdict (R. 3-4) which read in part as follows:

We, the jury, find that the fair market value of Parcel 16 containing 4,611 sq. ft. is the sum of----- \$46.11

We, the jury, find that the fair market value of the annual use of Parcel 16 is the sum of----- \$20.00

The verdict went on to find that "the fair market value" of Parcel 45 was \$277.59 and "the fair market value of the annual use" of that parcel was \$125.00. In respect of Parcel 46 the awards were \$515.62 and \$232.50, respectively, and for Parcel 50 they were \$2400 and \$980.

Accordingly, judgment in these amounts was entered (see R. 8).

ARGUMENT

Appellants' assertion (Br. 3-4) that the judgment does not conform to the verdict must be premised upon the assumption that in finding "the fair market value of the annual use" of each of the parcels the jury found the value of one year's occupation and that consequently judgment should have been entered for each of these sums multiplied by the number of years of occupancy. In other words, since occupation endured from July 25, 1942, until December 13, 1950, it is appellants' position that each sum should be multiplied by slightly more than $8\frac{1}{3}$. In passing it may be observed that had the jury so found, it would have found that the value of use and occupation for this period far exceeded the value of the fee. For instance, Parcel 16 was valued at \$46.11. According to appellants, the jury found that occupancy from

July 25, 1942, to December 13, 1950, was something more than \$166.66!

The record, however, makes further discussion unnecessary. Though the form of finding preferred by the trial judge is somewhat unusual, he made it perfectly plain that the jury was to find the value of use and occupation for the total period of that occupation and not for a single year. It is equally clear that the jury understood the judge. There is no pretense that it acted contrary to its understanding. Accordingly, there is no basis for appellants' contention.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

J. EDWARD WILLIAMS,
Acting Assistant Attorney General.

M. MITCHELL BOURQUIN,
*Special Assistant to the Attorney General,
San Francisco, California.*

JOHN F. COTTER,
*Attorney, Department of Justice,
Washington, D. C.*

OCTOBER 1951.

United States
Court of Appeals
for the Ninth Circuit

THE CITY OF ANCHORAGE, a Municipal Corporation, Z. J. LOUSSAC, Mayor of the City of Anchorage, B. W. BOEKE, City Clerk-Treasurer of the City of Anchorage, ROBERT E. SHARP, City Manager of the City of Anchorage,
Appellants,
vs.

ARTHUR E. ASHLEY and VIRGINIA ASHLEY,
Appellees.

Transcript of Record

Appeal from the District Court for the Territory
of Alaska, Third Division

FILED

NOV 14 1951

United States
Court of Appeals
for the Ninth Circuit

THE CITY OF ANCHORAGE, a Municipal Corporation, Z. J. LOUSSAC, Mayor of the City of Anchorage, B. W. BOEKE, City Clerk-Treasurer of the City of Anchorage, ROBERT E. SHARP, City Manager of the City of Anchorage,

Appellants,

vs.

ARTHUR E. ASHLEY and VIRGINIA
ASHLEY,

Appellees.

Transcript of Record

Appeal from the District Court for the Territory
of Alaska, Third Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

Attorney for Plaintiffs:

GEORGE McLAUGHLIN,

P.O. Box 2231,
Anchorage, Alaska.

Attorneys for Defendants:

HELLENTHAL, HELLENTHAL &
COTTIS,

P.O. Box 941,
Anchorage, Alaska.

In the District Court for the Territory of Alaska,
Third Judicial Division

No. A-6622

ARTHUR E. ASHLEY and VIRGINIA
ASHLEY,

Plaintiffs,

vs.

THE CITY OF ANCHORAGE, a municipal corporation; Z. J. LOUSSAC, Mayor of the City of Anchorage; B. W. BOEKE, City Clerk-Treasurer of the City of Anchorage; ROBERT E. SHARP, City Manager of the City of Anchorage,

Defendants.

COMPLAINT

The plaintiffs complain of the defendants and for a cause of action allege:

I.

That the plaintiffs are and at all times hereinafter mentioned were residents of the Territory of Alaska, Third Judicial Division.

II.

That the defendant City of Anchorage is a municipal corporation duly incorporated and existing under and by virtue of the laws of the Territory of Alaska.

III.

That the defendant Z. J. Loussac is the Mayor of

the City of Anchorage, and a resident of the Territory of Alaska, Third Judicial Division.

IV.

That the defendant B. W. Boeke is the City Clerk-Treasurer of the City of Anchorage, and a resident of the Territory of Alaska, Third Judicial Division.

V.

That the defendant Robert E. Sharp is the City Manager of the City of Anchorage, and a resident of the Territory of Alaska, Third Judicial Division.

VI.

That the plaintiffs are, and at all times herein-after mentioned, were the owners in fee and in possession of that certain lot, piece, and parcel of land situated in the City of Anchorage, in a certain alleged Sewer Improvement District No. 1, and more particularly described as follows:

Lot Ten (10) of Block Forty Two A (42 A) of the South Addition of the City of Anchorage.

VII.

That on or about the 18th day of October, 1950, the defendant City of Anchorage, did pass a certain resolution Number 577, a copy of which is attached hereto and made a part hereof, by virtue of which the said City of Anchorage, did wrongfully and unlawfully, and without the consent of the plaintiffs, levy an alleged assessment and impose an alleged lien in the amount of \$336.77 on the above described property of the plaintiffs, pursuant to a certain notice of special assessment made by the City of Anchorage on the 24th day of October, 1950, which is attached hereto and made a part hereof.

VIII.

That by virtue of said resolution of the City of Anchorage and notice of special assessment, the defendant City of Anchorage claims a paramount lien or mortgage or interest in and to the above described land of the plaintiff, and the said claim of the defendant City of Anchorage is without any right whatsoever and contrary to the statutes of the Territory of Alaska, and the said Defendant and each of them is without any right whatsoever, and have not any estate, right, title, or interest, lien or claim whatever in said lands or premises of the plaintiffs or any party thereof.

IX.

That by virtue of said claim of the said defendant City of Anchorage, the plaintiffs' property has depreciated in value, and is not readily marketable, and will further depreciate in value with the continued assertion by defendants of a claim of lien.

X.

That the plaintiffs have no adequate remedy at law.

Wherefore, plaintiffs pray the court,

That the defendant City of Anchorage be required to set forth the nature of its claim against the plaintiffs, and that the adverse claim of lien of the City of Anchorage be determined by decree of this court.

That by the said decree it be declared and adjudged that the defendant City of Anchorage has no estate, or lien, or interest whatever in or to said land or premises, or in any part thereof, and that the title of the plaintiffs is good or valid.

That the defendants and each of them be enjoined and debarred forever from asserting, or aiding or assistin in asserting in any manner whatsoever, any claim or lien whatever adverse to the plaintiffs by virtue of the aforesaid assessment on plaintiffs property,

For Such Other and further relief as to shall seem meet and agreeable to equity, and for the costs of this action together with a reasonable attorneys fee.

/s/ GEORGE M. McLAUGHLIN,
Attorney for Plaintiffs.

United States of America,
Territory of Alaska—ss.

Arthur E. Ashley and Virginia Ashley, each being first duly sworn on oath do depose and say: That they are the plaintiffs in the foregoing action, have read the foregoing complaint, know the contents thereof, and that the same is true.

/s/ ARTHUR E. ASHLEY,
/s/ VIRGINIA ASHLEY.

Subscribed and sworn to before me this 4th day of December 1950.

[Seal] /s/ JAMES E. SWAN,
Notary Public, Territory of Alaska
My Commission expires Feb. 21, 1954.

[Printer's Note: Resolution No. 577 is set out in full at pp. 88-90 of this printed record.]

City of Anchorage, Alaska

NOTICE OF SPECIAL ASSESSMENT
SEWER 1949-50

Districts No. 1, 2, 3 and 4

Lot 10; Block 42A; Addition South

From: City of Anchorage

To: Arthur E. and Virginia Ashley
General Delivery, City.

You are hereby notified that a Special Assessment for Sewer Improvements has been levied against the property which you own, namely, the above indicated lot and block in the City of Anchorage.

Your attention is invited to the following quotation from Resolution No. 577, passed and approved by the City of Anchorage, 18 October 1950, which provision covers the time of delinquency, method of payment and the amount of penalty and interest thereon:

“3. The assessment levied herein shall be paid as herein described on or before 15 January 1951, and shall become delinquent at midnight, 15 January 1951. The assessment may be paid in five equal annual installments, said installments to be payable on or before 15 January 1951, 15 January 1952, 15 January 1953, 15 January 1954 and 15 January, 1955. If any such installment is not paid when due, the entire unpaid portion of said assessment shall immediately become due. No interest shall be charged on unpaid balances of said special assessment if promptly paid as afore described.

If not fully paid before delinquency, the unpaid assessment shall bear interest at the rate of eight per cent per annum; a penalty of eight per cent shall be added to said unpaid balance of the assessments, not including interest."

Your property has been assessed in the amount of \$336.77 payable over a five year period as follows:

Installment No. 1 payable on or before Jan. 15, 1951—\$67.37.

Installment No. 2 payable on or before Jan. 15, 1952—\$67.35.

Installment No. 3 payable on or before Jan. 15, 1953—\$67.35.

Installment No. 4 payable on or before Jan. 15, 1954—\$67.35.

Installment No. 5 payable on or before Jan. 15, 1955—\$67.35.

Please Note: Any Installment not paid when due causes all future installments to become due and payable, with penalty and interest, immediately.

For your information, the City Council will still consider requests for adjustment of the assessment levied where property owners feel their assessment is not equitable. In the event you feel the assessment levied against your property is not equitable, please notify this office in order that the matter may be submitted to the City Council for consideration.

The City Council is aware that the amount of this assessment is a great deal higher than originally estimated and that the City was negligent in not so advising property owners of this fact at an earlier date. The City's financial position is such that the levying of the full amount was mandatory to meet the debt service on the bonds issued to pay for the sewer improvements petitioned for by the property owners in the four districts.

Dated at Anchorage, Alaska, this 24th day of October, 1950.

/s/ B. W. BOEKE,
ET City Clerk-Treasurer.

[Endorsed]: Filed Dec. 4, 1950.

[Title of District Court and Cause.]

MOTION TO DISMISS

The defendants move the Court as follows:

To dismiss the action because the complaint fails to state a claim against defendants upon which relief can be granted.

Dated at Anchorage, Alaska, this 20th day of December, 1950.

/s/ JOHN S. HELLENTHAL,
Attorney for Defendants.

Acknowledgment of Service attached.

[Endorsed]: Filed Dec. 22, 1950.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

The plaintiffs move the court as follows:

To grant a summary judgment for the plaintiffs against the defendants, or any of them.

This motion is based upon the attached affidavits, certified copies of records, and all the files and proceedings herein.

Dated at Anchorage, Alaska, this 26th day of December, 1950.

/s/ GEORGE M. McLAUGHLIN,
Attorney for Plaintiffs.

To: John S. Hellenthal, Esq., Attorney for Defendants:

Please take notice, that the undersigned will bring the above motion on for hearing before this court at the Court House, Post Office Building, Anchorage, Alaska, on the 5th day of January 1951, at 2 o'clock in the afternoon of that day or as soon thereafter as counsel can be heard.

/s/ GEORGE M. McLAUGHLIN,
Attorney for Plaintiffs.

Acknowledgment of Service attached.

AFFIDAVIT IN SUPPORT OF A MOTION OF SUMMARY JUDGMENT

Arthur E. Ashley, one of the plaintiffs herein, being duly sworn, does depose and say:

1. That he is one of the plaintiffs in the above described cause; that the facts set forth herein are within his personal knowledge.

2. That he and his wife, plaintiff Virginia Ashley, are the owners in fee as tenants by the entirety of the premises located at 1513 I Street, in the confines of the City of Anchorage; that these premises are more particularly described as follows:

Lot Ten (10) of Block Forty Two (A) (42A) of the South Addition of the City of Anchorage.

3. That he and his wife, said Virginia Ashley, have been in possession of said premises since the 22nd day of August 1947 by virtue of a deed dated the 22nd day of August 1947 from Ronald D. Humphrey to Arthur E. Ashley and Virginia Ashley, as husband and wife, That said deed was recorded on June 20, 1949 at Anchorage Precinct and Recording District in Volume Eighty (80) Book of Deeds of the City of Anchorage at page 108.

4. That I was never aware of any invalidity in the sewer assessment proceedings until I was so informed by George M. McLaughlin, my attorney, in September, 1950.

5. That I have read Resolution No. 545, City of Anchorage, Alaska, and know as a fact that my above described property comes within and is included within Sewer Improvement District Number 1.

6. That I have read Resolution No. 545, City of Anchorage, Alaska, and know as a fact, and observed, that as stated therein, sewer construction had commenced and had substantially proceeded throughout Sewer Improvement District Number 1, sometime prior to the second day of March 1950.

7. That I was unaware that a sewer assessment was to be levied for the construction of said sewers in Sewer Improvement District No. 1.

8. That I did at the hearing of the City Council of the City of Anchorage protest against the imposition of the levy of assessment.

9. That I never signed a petition for the construction of said sewer.

In witness whereof I have affixed my name this 21st day of December, 1950.

/s/ ARTHUR E. ASHLEY,
Plaintiff herein.

Subscribed and sworn to before me this 22nd day of December, 1950.

[Seal] /s/ JAMES E. SWAN,
Notary Public in and for the Territory of Alaska.
My Commission expires 21 Feb. 54.

AFFIDAVIT IN SUPPORT OF A MOTION FOR SUMMARY JUDGMENT

United States of America,
Territory of Alaska—ss.

Virginia Ashley, one of the plaintiffs herein, being duly sworn, does depose and say:

1. That she is one of the plaintiffs in the above described cause; that the facts set forth herein are within her personal knowledge.

2. That she and her husband, plaintiff Arthur E. Ashley, are the owners in fee as tenants by the entirety of the premises located at 1513 I Street, in the confines of the City of Anchorage; that these premises are more particularly described as follows:

Lot Ten (10) of Block Fourty Two A (42A) of the South Addition of the City of Anchorage.

3. That she and her husband, said Arthur E. Ashley, have been in possession of said premises since the 22nd day of August 1947 by virtue of a deed from Ronald D. Humphrey to Arthur E. Ashley and Virginia Ashley, as husband and wife; that said deed was recorded on June 20, 1949, at Anchorage Precinct and Recording District in Volume Eighty (80) Book of Deeds of the City of Anchorage at page 108.

4. That I was never aware of any invalidity in the sewer assessment proceedings until I was so informed by George M. McLaughlin, my attorney, in September 1950.

5. That I have read Resolution No. 545, City of Anchorage, Alaska, and know as a fact that my above described property comes within and is included within Sewer Improvement District Number 1.

6. That I have read Resolution No. 545, City of Anchorage, Alaska, and know as a fact, and observed that, as stated therein, sewer construction had commenced; and had substantially proceeded throughout Sewer Improvement District Number 1, prior to the second day of March 1950.

7. That during the fall and winter of 1949-50, substantial excavating was done throughout Sewer Improvement District Number 1, for the laying of sewers; I personally observed this.

8. That I was unaware that a sewer assessment was to be levied for the construction of said sewers in Sewer Improvement District No. 1.

9. That I never signed a petition for the construction of said sewer.

10. That the notice of special assessment attached to the complaint herein was actually received by me in the mail.

/s/ VIRGINIA ASHLEY,
Plaintiff herein.

Subscribed and sworn to before me this 22nd day of December, 1950.

[Seal] /s/ JAMES E. SWAN,
Notary Public in and for the Territory of Alaska.
My Commission expires 21 Feb. '54.

EXCERPTS FROM THE MINUTES OF THE
COMMON COUNCIL OF THE CITY
OF ANCHORAGE

In Regard to the Trunk Outfall Sewer and
Sewer in the South Addition to the Original
Townsite of Anchorage

Jan. 19, 1947—page 206, vol. 6: Public Improvement Plans were discussed.

“It was moved by Dodd and seconded by Odsather that the City Attorney pass on the legal status and draw up the necessary ordinances. All voted in the affirmative.”

Feb. 8, 1947—page 211, vol. 6: Proposed New
Constructions:

* * * * *

“Sewers: Chester Creek Outfall and 1st Avenue
Outfall.

(No Assess. against Prop. for above work)	\$225,000.00
Sewer Lines in South and Third Ad- ditions (Property Assessments will 2/3 of this total)	\$225,000.00
<hr/>	
Total	\$450,000.00''

March 27, 1947—Election was held and above ap-
proved by voters.

April 2, 1947—page 225, vol. 6: Results of above
election of 3-27-47 under Ordinance 193:

* * * * *

Proposition No. 4—Construction of Trunk Sewer
in 3rd and South Additions: For: 824. Against: 109.

Proposition No. 5—Expand Existing Sewers. For:
810. Against: 106.

May 14, 1947—page 242, vol. 6: The Proposed
Ordinance covering the construction of a trunk out-
fall sewer line to serve the South and Third Addi-
tions was read. Ordinance No. 203 adopted.

July 2, 1947—page 261, vol. 6: Proposed Ordinance
No. 216, Amending Ordinance No. 206 read and
adopted.

May 6, 1948—page 376, vol. 6: Decision reserved in
regard to Sewer Bonds for Trunk Outfall Sewer
in the South and Third Additions and the expanding
of present sewer system.

May 7, 1948—page 376, vol. 6: Decided not to
accept Marshall and Williams offer of Bonds.

May 10, 1948—page 379, vol. 6: "After consider-
able discussion a vote was taken on the motion to
negotiate for the sale of the bonds. All voted in the

affirmative. The City Attorney was directed to draft an agreement concerning the purchase of the bonds in accordance with his suggestions and those of the Council.”

May 11, 1948—page 384, vol. 6: Revised agreement with Foster and Marshall for the sale of Bonds accepted.

June 2, 1948—page 396, vol. 6: “Mr. Arthur Waldron and Dr. Johnson requested information in regard to when the outfall sewer would be constructed that was authorized by the voters on March 27, 1947. The group was informed by the Council that the possibility of construction of the sewer this year was very doubtful.”

Feb. 2, 1949—page 102, vol. 7: “The City Comptroller requested that a policy be determined on the payment of paving, water and sewer assessments by the property owners.

“It was moved by Rozell and seconded by Summers that property owners be given 5 years in which to pay for paving assessments in 5 equal installments and 3 years on water and sewer assessments. All voted in the affirmative.”

Feb. 10, 1949—page 106, vol. 7: “The method of assessment for the Trunk Outfall Sewer Project and Lateral Sewer Extensions and maturity dates for bonds to be issued to finance these projects was discussed.

“It was decided that, inasmuch as the Trunk Outfall Sewer was designed with sufficient capacity to permit expansion of the lateral extension system, a

special assessment would not be levied except in those cases where sewer services will be directly connected to the trunk sewer line. In these cases property owners will be assessed an amount equal to the normal cost of installing a lateral sewer line with sufficient capacity to serve their property.

“It was also decided that an assessment equal to two-thirds of the cost of installing the Lateral Sewer Extensions would be levied.

“The City Attorney was instructed to draft an Ordinance to promulgate these decisions and the Comptroller instructed to compute bond maturity dates accordingly.”

April 20, 1949—page 132, vol. 7: “Proposed Ordinance No. 1005, and Ordinance authorizing the issuance of \$225,000.00 in bonds for the construction of two trunk outfall sewer lines was read.

“It was moved by Summers and seconded by Krause that Ordinance No. 1005 be approved. All voted in the affirmative.”

June 15, 1949—page 160 and 161, vol. 7: “The Flora Engineering Company submitted a proposed contract with the Kincaid and King Construction Company for the installation of sanitary sewer main and manholes along G Street from 11th to 14th for an approximate cost of \$8,800.00.”

“It was moved by Setchfield and seconded by Krause that the contract with Kincaid and King for the installation of a sewer main along G Street from 11th to 14th Streets be approved. All voted in the affirmative.

A lengthy discussion in regard to the policy of

assessing cost of sewer service lines within the City was held. The following policy relative sewer services to be installed on the sewer line between 11th and 14th on G Street, prior to paving of that street, was adopted:

“That property owners be contacted and informed of the price the City can contract the installation and given the option to have the City install the services or agree to have the service installation completed no later than ten (10) days from date the sewer ditch is opened; the total cost in either event to be borne by the property owner.

“The Flora Engineering Company submitted final plans and specifications for the construction of the sewer project as approved by the voters at the election of March 27, 1947.

“It was moved by Setchfield and seconded by Summers that the plans and specifications for the sewer project be approved. All voted in the affirmative.”

July 14, 1949—page 177, vol. 7: “Mr. Flora, of the Flora Engineering Company, submitted the contract with Kincaid and King Construction Company, Inc. for sewer on G Street, 11th to 14th, in the amount of \$9,523.94 and recommended approval.

“It was moved by Setchfield and seconded by Rozell that the City Manager be authorized to sign a final contract with Kincaid and King Construction Company, Inc., in the amount of \$9,523.95, said action in accordance with the minutes of the meeting of June 15, 1949, wherein a proposed contract with the Kincaid and King Construction Co. for the installation of a sewer main between 11th and 14th Streets on G Street was approved in the approxi-

mate amount of \$8,800.00. All voted in the affirmative."

Aug. 3, 1949—page 182, vol. 7: "Deletion from the Sewer Assessment of the cost of a sewer lift was discussed and the matter referred to the City Manager and City Engineer."

"A discussion was held on method of payment of Special Assessments.

"It was moved by Rozell and seconded by Krause when a resolution providing for payment of assessments is drafted, provision be made that a discount of 3½% be allowed on any payments made in advance on all assessments and water improvement assessments. All voted in the affirmative.

Nov. 1, 1949—page 240 and 241, vol. 7: "It was moved by Setchfield that the Council go into executive session to consider the Water Supply System and sewer project and related contracts. All voted in the affirmative.

* * * * *

Construction progress to date and certain deviations from contract specifications that had been brought to the attention of the Flora Engineering Company by inspectors of the City Engineer's office on the sewer project was briefly discussed."

Nov. 7, 1949—page 255, vol. 7: "The City Comptroller requested that a policy be established regarding assessments on incomplete paving and sewer projects.

"It was moved by Davis and seconded by Rozell that partial assessments be levied on incomplete sewer and paving projects. All voted in the affirmative.

Nov. 26, 1949—page 264, vol. 7: “Mr. Claude Isenberger spoke briefly and made an oral report on the progress of the sewer project.”

Nov. 27, 1949—page 264 and 265, vol. 7: “Mr. Claude Isenberger, of the Flora Engineering Company, spoke briefly and made an oral report on the construction of the Sewer Project.

After considerable discussion it was moved by Barber and seconded by Davis that the City give the Stateside Construction Company and his Surety a three day written notice of it's intent to exercise it's right, under paragraph 16 of the Contract, dated July 1, 1949, to undertake the work required between Station 4, plus 81 and 5 plus 81 on the Chester Creek outfall line because of the contractor's failure to properly prosecute this phase of the contract after repeated notice from the Engineer. All voted in the affirmative.”

Dec. 14, 1949—page 277 and 278, vol. 7: “A letter was read from the Flora Engineering Company and, upon recommendation of the City Engineer, quoting an estimate cost to the contractor for gravel used in bedding for the sewer line along First Avenue and in the South Addition, and recommended approval of \$11.00 per cubic yard for the gravel used on First Avenue Sewer project and \$16.00 per cubic yard on the sewer outfall in the South Addition project as follows:

146 cubic yard at \$11.00.....	\$1,606.00
167 cubic yard at \$16.00.....	2,672.00

Total.....\$4,278.00

“It was moved by Davis and seconded by Setch-

field that the recommendation of the Flora Engineering Company be accepted and approved for payment. All voted in the affirmative.

Feb. 8, 1950—page 325, vol. 7: “The City Engineer reported that a portion of sewer system in the South Addition would be in operation within approximately one week.”

March 1, 1950—page 334, vol. 7: “Proposed Resolution No. 545, Sewer Assessments was read.

“It was moved by Peterson and seconded by Setchfield that the rules be suspended to consider the resolution. Voted for the motion: Barber, Davis, Peterson, Setchfield. Voted against the motion: Rozell. Motion declared lost.

“It was moved by Peterson and seconded by Setchfield that this be considered the First Reading of the resolution. Voted for the motion: Barber, Davis, Peterson, Setchfield. Voted against the motion: Rozell. Motion declared carried.”

March 2, 1950—page 339-342, vol. 7: “Proposed Resolution No. 545, Sewer Assessments in Sewer Districts No. 1, 2, 3 and 4 was read for the second time.

“City of Anchorage, Alaska

Resolution No. 545

Sewer Assessments in Four Districts

Be It Resolved by the City of Anchorage—

1. That the following described sewer districts were created by the City of Anchorage.

* * * * *

Sewer Improvement District No. 4

Beginning at a point in the northeast corner of Block 36 of the East Addition of the City of Anchorage or at the corner of First Avenue and Gambell Street; thence south along the east corporate line of

“Sewer Improvement District No. 1

Beginning at the intersection of 12th Avenue and “U” Street, where the corporate limits of the City meets the boundary of the Alaska Railroad Terminal Reserve; thence south along “U” Street to a point 187.50 feet from the intersection of “U” Street and 13th Avenue; thence east parallel from the intersection of “U” Street and 13th Avenue; thence east parallel to Scenic Way to the northeast corner of Block 47 of the South Addition; thence south along “S” Street a distance of 375 feet; thence southeast to a point midway on the South border of Block 46 of the South Addition, which point is on the south corporate limit; thence east along the corporate limits of the City or 16th Avenue to where it intersects with “C” Street; thence north along “C” Street to 12th Avenue; thence west 500 feet along 12th Avenue; thence north at right angles to 11th Avenue; thence west along “G” Street to 11th Avenue; thence west along 11th Avenue to “H” Street; thence south on “H” Street to 13th Avenue; thence west 750 feet along 13th Avenue; thence north at right angles to 12th Avenue; thence west along 12th Avenue to “L” Street; thence north 150 ft. along “L” Street; thence west 300 feet at right angles through the alley to “M” Street; thence north on “M” Street to 11th

Avenue; thence west on 11th Avenue to "N" Street; thence south on "N" Street 150 feet; thence west at right angles through the alley to the extension of "R" Street; thence north at right angles 150 feet to 11th Avenue; thence west along 11th Avenue to the east border of the Alaska Railroad Terminal Reserve; thence southwest along the east boundary of the Alaska Railroad Terminal Reserve to the point of beginning."

* * * * *

2. "That the owners of more than one-half in value of the property to be specially benefited by the installation of sewers in the above-described sewer districts have heretofore, prior to the beginning of construction on said projects, requested in writing that the City assess two-thirds of the cost thereof, namely, of the cost of construction of necessary sewer facilities, including trunk and lateral sewers, to serve their properties which were described in the petitions, against their real property so specially benefited; that the following tabulation shows the areas where such consents have been obtained and show as to each area the total assessed valuation of property specially benefited, the valuation represented by property owners' signatures on petitions and the percentage of total valuation represented on signed petitions:

Sewer Improvement District No. 1: Total assessed valuation, \$1,608,500.00; signed up valuation, \$923,750.00; signed up % of total valuation, 57.42%.

Sewer Improvement District No. 2: Total assessed valuation, \$215,875.00; signed up valuation, \$132,350.00; signed up % of total valuation, 61%.

Sewer Improvement District No. 3: Total assessed valuation, \$156,350.00; signed up valuation, \$111,-875.00; signed up % of total valuation, 71.55%.

Sewer Improvement District No. 4: Total assessed valuation, \$684,800.00; signed up valuation, \$465,-575.00; signed up % of total valuation, 68%.

3. That the property to be specially benefited by the sewer improvements within the above-described areas consists of each lot in said above-described areas in proportion to the area thereof; it being hereby found that each lot of real property within the above-described areas is benefited in proportion to its area.

4. That the total value of the property specially benefited by the proposed improvements is as indicated in par. 2 above; that the total value of the property specially benefited by these improvements owned by persons whose signatures appear on written petitions on file with the City Clerk requesting the particular improvement is as indicated in par. 2 above; that the percentage of value of the property to be specially benefited by each improvement in each area is as indicated above in par. 2, and, as indicated, is represented on petitions requesting said improvements; that the requisite petitions signed by all the owners of at least one-half in value of the property specially benefited by the above improvement are on file with the City.

5. That, heretofore, prior to the commencement of construction of the requested improvements above described, and now, the Council finds that the requested improvements are necessary and should be made; that it is necessary that the City construct

sewer systems in said above described areas.

6. The Council hereby finds the above facts stated in paragraphs 1 to 5 inclusive to be the true facts in this matter and hereby expressly makes this finding retroactive to the date of submission of petitions and date of commencement of construction and award of sewer contract to Stateside Construction Company and hereby ratifies and confirms all its prior actions in this matter, expressly its prior resolve that the above-described improvements were necessary and that they should be made and that the petitions were legally sufficient and that requests have been signed by the owners of at least one-half in value of the property to be specially benefited.

7. The Council hereby decides that two-thirds of the cost of the sewer improvements herein mentioned shall be assessed against the real property so specially benefited in proportion to the benefit received by each lot in accordance with the area of each lot in the above-described districts and pursuant to sub-section 104.2, Chap. 3, Anchorage General Code; this finding shall ratify and confirm prior findings in this matter made by the Council at the time of receiving the petitions or requests for the project and shall be retroactive to that time.

8. The City Manager shall keep correct account of all of the expenses of the improvement herein authorized in accordance with sub-section 102.4, Chap. 3, Anchorage General Code.

Publication of this resolution shall be made by posting a copy hereof on the City Hall Bulletin

Board, for a period of ten (10) days following passage.

/s/ EDWARD G. BARBER,

Acting Mayor, City of Anchorage

Attest:

/s/ B. W. BOEKE,

City Clerk, City of Anchorage."

It was moved by Setchfield and seconded by Peterson that Resolution No. 545 be adopted. Voted for the motion: Barber, Davis, Krause, Peterson, Setchfield. Voted against the motion: Rozell. Motion declared carried."

April 19, 1950—page 385, vol. 7: "The City Engineer gave an oral report on the progress of the Sewer Main installation in the South Addition."

Page 25, vol. 8, 6-7-50: Mr. Ed Palmquist requested that a sewer main be constructed along his property at 1518 K Street. Mr. Palmquist was assured by the City Engineer that construction of a sewer line in that block would be installed in July of this year."

8-9-50—page 82, vol. 8: The City Engineer gave an oral report on the construction of the sewer lines and stated they are in operation except for cleaning the First Avenue Sewer line.

8-23-50—page 93, vol. 8: "Mr. Ed Arnell, attorney for the Stateside Construction Company, requested that immediate action be taken to *final* out the sewer contract which his firm considers a completed installation."

“The Acting City Manager reported that additional time would be required before a final settlement could be attained principally because of the fact that the contractor only recently filed claims for extra work and the City finds incomplete.”

9-6-50—page 103, vol. 8: “The City Manager and City Engineer submitted a schedule of Sewer Assessments in four districts and gave a detailed explanation on the method of averaging the assessment costs.”

“Proposed Resolution No. 570, providing for sewer assessments in four Districts and a hearing to be held on September 27, 1950 was read.

“After considerable discussion it was moved by Setchfield and seconded by Peterson that the rules be suspended to consider Resolution No. 570 Voted for the motion: Barber, Krause, Peterson and Setchfield. Voted against the motion: Rozell. The motion was declared lost.

“After further discussion it was moved by Setchfield and seconded by Peterson that this be considered the first reading of Resolution No. 570. Voted for the motion: Barber, Krause, Peterson and Setchfield. Voted against the motion: Rozell. The motion was declared carried.

9-13-50—page 107 etc., vol. 8: “Resolution No. 570, providing for sewer assessments in four districts and for a hearing to be held on September 29, 1950 was read for the second time.

“It was moved by Setchfield and seconded by Peterson that Resolution No. 570 be adopted. All voted in the affirmative.

Copy

"Resolution No. 570

Copy

Sewer Assessments in Four Districts

Be It Resolved by the Council of the City of Anchorage, Alaska:

1. Resolution No. 545, passed and approved the 1st day of March, 1950, directed the City Manager to proceed with the installation of sanitary sewer facilities in sewer improvement districts Nos. 1, 2, 3 and 4 created by said resolution; said resolution found that the property to be specially benefited by said improvements consisted of each lot in said described sewer improvement districts in proportion to the area thereof; said resolution further directed that two-thirds ($2/3$) of the cost of the improvement be assessed against the property specially benefited in proportion to the benefit received by each lot in accordance with the area of each lot in the aforementioned sewer improvement districts and pursuant to Subsection 104.2, Chapter 3, Anchorage General Code, and that the City Manager keep a record of all the expenses of the improvements.

2. It is hereby found that the cost of said improvement is the sum of \$424,792.29. Attached to this resolution and incorporated herein as if expressly set out in the body hereof and attached hereto as "Exhibit A" is the correct account of said improvements, entitled "Assessment for Sewers Constructed During 1949 and 1950."

3. It is hereby determined that the benefit received by each of the lots contained in the afore-

mentioned sewer improvement districts is as shown in Exhibit A and therefore the amounts so shown should be assessed.

4. The Municipal Assessor is hereby directed to make the above referred to assessment against each of the above referred to lots and enter the same upon an assessment roll by him prepared in form suitable for the signature of the Mayor and his certification that it is the assessment roll as finally settled by the City Council; said assessment roll shall contain a brief description or designation of each tract of property, the name of owner or reputed owner thereof, and the amount of the assessment.

5. Objections to said assessments, if any, shall be heard at a special Council meeting on September 29, 1950, at eight o'clock p.m. in the Council Chambers, City Hall, Anchorage, Alaska.

6. The City Clerk is hereby directed to send a written notice, by mail, to each owner of the properties against which such assessment is made, which notice shall state the amount of the assessment against such particular tract and the time fixed by the Council for hearing objections; said notice shall be mailed at least fifteen (15) days before September 29, 1950.

Publication of this Resolution shall be made by posting a copy on the City Hall Bulletin Board for a period of ten (10) days following passage.

First reading—September 6, 1950.

Second reading—September 13, 1950.

Passed and approved this 13th day of September, 1950.

/s/ Z. J. LOUSSAC,
Mayor, City of Anchorage.

Attest:

/s/ B. W. BOEKE,
City Clerk."

Copy

9-13-50—page 113, vol. 8: "The City Engineer reported on the following: That two meetings were held with representative of the Stateside Construction Company, relative to extra costs claims submitted by their company in connection with the Sewer contract.

9-19-50—page 115, vol. 8: "Mrs. John Coats spoke briefly regarding a recent Sewer Assessment notice on her property located at lots 4 and 5, N $\frac{1}{2}$ block 21, South Addition and requested that the amount be cancelled due to the fact that she had given an easement three years ago for the sewer to be installed at the New Chugach School and was given permission at that time, to connect to the school sewer.

"After considerable discussion it was moved by Rozell that the Sewer assessment levied on lots 4 and 5, N $\frac{1}{2}$ block 21, South Addition be cancelled. After further discussion the motion was withdrawn and the matter referred to the City Manager."

9-29-50—page 122, vol. 8: "The City Manager announced that the hearing to be held in regard to the Sewer Assessments in District Nos. 1, 2, 3 and 4 would begin and requested the City Engineer to explain to those present the basis upon which the As-

sessments were made and to outline the areas comprising each district.

The meeting was recessed at 8:15 p.m. to reconvene at 8:30 in the KENI Studio, located in the 4th Avenue Theatre Building, in order to accommodate the large audience which had gathered in the Council Chambers of the City Hall.

The meeting resumed at 8:40 in the KENI Studio.

The City Engineer outlined the method which had been used in determining the assessments and the area of each district.

“Oral and written objections were heard, and recorded, from property owners for the Council’s consideration. Following is a record of those who spoke or entered written objections to the assessment:

Sewer Hearing

Special Meeting of the City Council Held on September 29, 1950, KENI Studio at 8:30 p.m.

“Mr. Ed. Barber, Acting Mayor: The hearing is now reconvening on sewer questions. Any persons wishing to be heard may present their questions to the City Engineer. We will start with District No. 1.

Rosenkrantz: Lot 7 and 8, block 27C, N $\frac{1}{2}$ block 33A, N $\frac{1}{2}$ Block 33B. I was assessed \$160.00 per lot but *not* it is \$336.77 per lot. Does this include water also?

Mr. Tryck: No, it does not include water. The estimated assessment was \$190.00 and at this time is \$336.77. The reason for the higher assessment is that the contract cost was considered higher than estimated cost of the project.

Rosenkrantz: That is more than double. It should not be 100% more. The petition I signed was for \$160.00.

Tryck: It was \$190.00.

Rosenkrantz: The lots assessed are nothing but a swamp. It isn't worth the price because no one could build there. The upper lots may be all right. That's on 33A, the S1½ of 33A.

Tryck: There is low land there, some of it in water.

Rosenkrantz: The corner lot is the worst of all and it is assessed as high as the best one.

Tryck: All lots are assessed on a unit price basis for the purpose of this sewer assessment. The lot over here is assessed the same as the lot over there.

Rosenkrantz: I can't sell for anywhere near that price. No one would want it. No one could build on it. It is not habitable. It is swamp. How about the water?

Tryck: Water has no connection with this.

Rosenkrantz: How can we value the property?

Tryck: Water information is available at the City Hall to anyone that asks for it.

Rosenkrantz: I have already been there.

Barber: This is a sewer question.

Rosenkrantz: Are property taxes on the same basis?

Tryck: There is no assessment for water mains. You pay \$161.00 at the time you connect to the main.

Rosenkrantz: I have to pay \$161.00? I have already paid for water.

Barber: Next person to be heard?

Mrs. Frank Moore: Lot 3, block 38D. Assessment

\$376.00. Why am I assessed \$376.00 when the assessment in block 33 is \$336.77?

Tryck: Your lot is slightly larger.

Moore: It serves the same amount of frontage. It costs more to connect from the sewer to the house on my lot and it is a shorter lot. It is 165 feet and I gave the city 10 feet for an alley.

Tryck: I can't answer that question.

Moore: I would like to have it looked into and figured on a basis of length rather than frontage.

Mr. Geo. McLaughlin, Attorney, representing property owners in District No. 1, interrupted at this point and asked that he be allowed to present objections intoto. Permission granted by Barber and Mr. McLaughlin read his objections as stated in his notice addressed to the City Council under date of September 29, 1950.

Mr. Herold Stringer, Attorney: I join with Mr. McLaughlin in protesting the assessments for the reasons that Mr. McLaughlin has just stated.

Hauser: I own property in the First Addition, South Section. Do you go by certain lot sizes or does it make a difference on the frontage of the lot?

Tryck: In this area, the assessments were computed on frontage.

Hauser: Then the assessments are for the idea of the trunk line whether or not the property is served by it. Is that right?

Tryck: That is correct.

Hauser: People on 11th Avenue have connections from various other sections, particularly at the time CAA was put in my—interrupted by

Tryck: That was before my time.

Hauser: There are people living on 10th and

12th that will never have laterals. Are they to be assessed because they are adjacent to that trunk-line?

Tryck: No, in general we are not including anyone in the District who had sewer service.

Hauser: If you do not have a full lot and have a vacant lot next to you should you be assessed for part of a lot? My particular case, I live at 1230 11th and have two lots in block 25A, lots 13 and 14. One lot is 44x140 feet, the other is 4x140 feet and both are equally assessed.

Tryck: One lot should have been less than the other.

Hauser: Marion Pendergrass was the original owner and he sold to L. J. Merritt but it did not get on the records.

Tryck: That can be corrected.

Hauser: Do you say that people that are not paying for service should be assessed for the trunk line?

Tryck: That is a broad question to answer. In some instances lines are too small or overloaded and are not adequate to serve three or four houses. Individually those lines will have to be replaced and very likely will be carried into this sewer and it will be only fair to pay the cost of the sewer.

Hauser: Now or when they are connected?

Tryck: Now.

Hauser: It is possible but not likely.

Mr. Stringer interjected and requested that Mr. McLaughlin be heard.

Hohman: E $\frac{1}{2}$ lots 3 and 4, block 42C, South Addition—\$366.00 assessment.

Tryck: We are trying to prevent the splitting of lots in half.

Hohman: It is 70x100 feet.

Tryck: 100 feet sewer will serve four lots.

Hohman: But it is not possible to get. How much would it cost?

Tryck: It would depend on who put it in.

Hohman: That would be more than the value of the lot I suppose.

Tryck: No, it probably could be put in for \$350.00 for 100 feet.

Banks: Lot 5, block 27C. How was the accounting for the assessments arrived at? Was Mr. Tryck responsible, the local council or some president down in the States. How were the costs arrived at for the individual owner?

Tryck: The costs were based on nothing larger than a 6 inch line. The City assumes the cost of anything larger. The unit cost of excavation depends on the contractor. The price varies.

Barber: Was the cost legally determined?

Tryck: Yes, it was legally determined. It is incorporated in the Anchorage General Code by Ordinance. Trunk assessments paying the cost of the large sewer which goes in to serve the entire area.

Geo. Cook: Lot 6, block 41A, South Addition. Lot 1, Block 41D, South Add. Was the contract on a cost-plus basis or flat sum?

Tryck: It was a unit price contract.

Cook: Will property owners outside the city limits pay the assessment?

Tryck: Only one property owner to date that has any permission to connect to the sewer and they are

paying the same as people inside are paying. They agreed to pay the same taxes. We had to go through some private property to get an easement and the City agreed to allow them to connect to the line.

Property Owner name not given: Lots 6, 7, 8, block 43B—When is sewer assessment due?

Sharp: In equal installments over a three year period. No earlier than sixty days after Council acts on the levy.

Property Owner: I have spent approximately \$2,000.00 on wells, cesspools and sewer. The best I can figure now, if I use the City's water and sewer it will cost me around \$3,000.00 more. The sewer I have has been in about five years and is good for another ten to fifteen years more. I don't care to give the City \$3,000.00. This forces me to sell my property even at a loss because I will not be able to pay the assessment. It is entirely unjust and unfair.

Geo. McLaughlin: The Council here tonight represents myself, Mr. Davis, Cuddy and Kay and Plummer and Arnell.

Barber: Go ahead.

McLaughlin: This protest is made in accordance with the provisions under Section 16-1-85 of Alaska Compiled Laws, Annotated 1949. Reference made to Section 16-181, Section 16-182; case No. 293577, Federal, Ketchikan Delinquent Tax Roll, October 5, 1920.

Property Owner name not given: Lot 38, South $\frac{1}{4}$ lot 4, 5, 6; it is not unusual for assessments to be levied and payments made over a 15 to 20 year period. I do not see just why all the property owners that now have lots here should foot the bill. I think

after the legality question is ironed out, you should give due consideration to the people who have to make a living and raise a family.

Barber: Your recommendation is that the Council consider the matter of spreading the sewer assessments over a greater length of time. The suggestion you have made is an objection that the Council can consider.

Triber: Lot E $\frac{1}{2}$, block 42C (although Mr. Triber was asked to repeat his lot number, I was unable to hear it or his comments.)

Property Owner name not given: Lot 11, block 25B. This property owner went into a lengthy discussion about his efforts to get the depth of a sewer which was built by a private contractor. Could not get easement to connect to sewer but "Northwest" got it overnight. Finally got easement for sewer and had to raise bathroom one foot to get drainage. Water backed up, flooded basement, yet I got a bill for \$60.

Tryck: Unfortunately you were on an old private sewer line. You never paid as assessment for a private system. These people have been asking to pay for sewer service. \$59.00 assessment was for sewer put in on 15th Avenue which could be connected into your house.

Ed. V. Davis, Attorney, representing several property owners in the South Addition, made reference to the following property owners and presented notices:

Wr. Renfrew, N 75 ft. S $\frac{1}{2}$ lot 10, S $\frac{1}{2}$ block 28.

Mary E. Fasnach, Tr. 7, N $\frac{1}{2}$ Block 28, South Addition and the W82 ft. lot 9, N $\frac{1}{2}$ Block 28, South Addition.

Geo. B. Grigsby, Trustee for Ken Luse, lot 2, block 37D.

A. L. Engebret, E 50 ft. lot 9, N $\frac{1}{2}$ Block 28; S 90 ft. of which is in N $\frac{1}{2}$ block 28.

*John Wik, lot 11, block 119, Original Townside, District No. 4 does not belong here.

Barber: This will be investigated and there is no objection to having these notices filed in connection with the hearing this evening.

Stringer: I would like to know whether or not you wish me to prepare similar lists as those prepared by Mr. Davis or is the earlier protest sufficient?

Barber: It would be best if protests were filed in writing.

Stringer: Are the oral protests sufficient for the moment?

Barber: It would be well to file protests in writing and file same.

J. C. Morris: Lot 2, block 48; lots 5, 7, 8, 13, 14, 15, 16, 17, 18, block 40A; lots 8, 9, 11, 12, block 40B; lots 2, 3, 4, 5, 6, block 40B; lots 13, 14, 15, 16, 17, 18, block 40B, S $\frac{1}{2}$ block 34 and lots 11, 12, block 38A of the South Addition. Also lot 2, block 18, East Addition.

Stringer: Will prepare letters for the above.

Ashley: Lot 10, block 42A. I ask that the Council assess a general tax and the whole sewer improvement be taken out of the General Tax Fund.

Heath: Lot 3, 4, block 44C; presented claim for damages to his property.

Tryck: We have Mr. Heath's claim and before

the contract is fnaled out we will require that all claims be satisfactorily taken care of.

King: Lot 3, block 43B; the benefit is not equal and the assessment is not fair.

Major Allen: Lot 11, block 42A, South Addition: I object to the double assess.

Albert Mason: Lot 1, block 40A; I do not think I should be assessed for something we do not have.

Tryck: That is something to be determined.

Mason: When the contractor is paid we should be assessed but not before. Why are we being assessed for something we do not have.

Harold Drew: Lot . . , block 45, South Addition; how is it prorated?

Tryck: It is based on the sq. ft. area of property you own.

Drew: I think the amount is excessive and would like a longer period of time to pay.

Tulford: Lot 7, block 40B; I got permission to build a cesspool. There was no sewer near me. I object to not being informed and not having a notice in the paper.

Knight: Lots 1, 2 and 3, block 33A; have house on lot 1 and part on lot 2. Received trunk assessment for lot 3 which adjoins a manhole at the corner of that particular lateral. In looking over ground there I cannot see any way that I can possibly build on this lot No. 3, and reach the manhole which is only 7 feet deep. Elevation of this manhole is 70.98, basement 69.63, 100 ft. area. Cannot get from my basement into the manhole. The house I would build on lot 3 would have to be lower than my present house. I will get no particular benefit from lot 3. Three year

period is pretty stiff for assessment. Think ten year pay period and up to twenty would be better.

Curtis: Lot 11, block 36B; sewer goes in alley between I and K, then turns down alley over to 15th Avenue. Is there going to be another assessment when that sewer goes in?

Tryck: No, because you are now set up to pay the lateral assessment, as well as the trunk assessment. If another lateral goes in and you have already paid for a lateral, there could be no assessment.

Curtis: Could I hook into another sewer line?

Tryck: Yes, Sir, that is correct.

Tulford: Lot 7, block 40B; I suggest that the City do something about the sewer which is a block away from me. Children play there and the sewer emptys right out there. There is no precaution taken to protect the children and eliminate the hazard.

Tryck: I was down looking at it and am attempting to take our own equipment or hire someone to remove the health hazard that exists there.

Francis Bowden: Lots 7, 8, block 120, Original Townsite; have never had sewer or water. Want to go on record that I object to manner of assessment and I know a number of people in same location feel the same way. I feel that a drainage outfall that I could not get to would not be good for my property. I cannot see the legality of it. I signed a petition for the sewer to go down my alley.

Otto Tiede: Lot 9, block 116, Original Townsite; have been connected with City sewer for 10 years. When they put in the new sewer they tore up our place and they tore up our fence. When they tore up

the ground my pipes froze. Have to let water run to keep them from freezing.

Tryck: But you have sewer service now and you have been assessed for the new sewer.

* * * * *

Page 135, vol. 8: "It was moved by Setchfield and seconded by Peterson that the meeting recess to reconvene in thirty minutes in the Council Chambers of the City Hall. All voted in the affirmative.

10-4-50—page 138, vol. 8: "The Hearing on Sewer Assessments in Sewer Districts 1, 2, 3 and 4 was resumed."

"Mr. George McLaughlin, attorney representing owners of property in Sewer District No. 1, in the South Addition, spoke briefly and submitted written objections to the Sewer Assessment. Following are those having filed written objections to Sewer Assessments in Sewer Districts No. 1, 2, 3, and 4 as of this date:

Refer back to pages 123 through 134.

"The City Attorney spoke briefly regarding the principles and methods used for the assessment of Public Improvements."

Page 139, vol. 8: "A discussion was held regarding the verbal and written protests of assessments in Sewer Districts 1, 2, 3 and 4. The protests heard or submitted in writing generally fall into the following categories:

1. Trunk benefit—Those present and the written protests entered into the record expressed the feeling that that portion of the assessment for the trunk

benefit should not be levied until lateral lines are installed.

It was moved by Setchfield and seconded by Rozell that the following policy be adopted in regard to "Trunk benefit":

Policy

The benefit to the property from the installation of sewer trunks even though the laterals have not been installed is real as the trunk line is an integral part of the system and is required to serve the area so outlined as benefited from the trunk installation. Therefore, the assessment shall stand.

All voted in the affirmative.

2. Period of payment; excessive cost—Protestants, in general, felt that the cost of the assessment was high and that the period of years (three years) for the payment is not sufficient.

It was moved by Setchfield and seconded by Rozell that the following policy be adopted in regard to "Period of payment; excessive cost":

Policy

In view of the high construction cost, the assessment is high and no one disputes this fact. Accordingly, the period for payment shall be extended to five (5) years and the General Fund Budget established to provide for the difference in funds required to meet bond maturities.

All voted in the affirmative.

3. Benefit to the irregular shaped and/or larger than standard lots (7000 sq. ft.) with large portions thereof unsuitable for residential development without prohibitive site preparation cost—there is justi-

fication for this third protest and an adjustment is recommended.

It was moved by Davis and seconded by Krause that the following policy be adopted in regard to objection No. 3:

Policy

If all of the following factors exist:

- (a) The lot is in excess of 7000 sq. ft. in area.
- (b) Approximately 20 to 25 per cent of the lot is unsuitable for normal residential development because the grade exceeds 60 per cent.
- (c) The lot is in Residential Zone No. 1.
- (d) The lot is not under a special permit for construction of multiple units (larger than duplex) since the enactment of the Zoning Code.

Then the assessment for such lots shall be reduced in direct proportion to the portion of the lot unsuitable for residential development. In no case shall the assessment levied be less than the amount levied for a standard size lot (7000 sq. ft.), in the same improvement district.

All voted in the affirmative.

4. Lots served and connected to the City Sewer System where no assessment was levied against the lot and other lots were assessed for the cost of the same sewer line.

It was moved by Rozell and seconded by Setchfield that the following policy be adopted in regard to objection No. 4:

Policy

In such cases both trunk and lateral assessments shall be levied.

All voted in the affirmative.

5. Lots that cannot be served by a sewer lateral because of the difference in elevation between the sewer lateral and building on the lot will not permit gravity flow; but can be served by the installation of a sump pump.

It was moved by Davis and seconded by Setchfield that the following policy be adopted in regards to objection No. 5:

Policy

In the above case, the trunk assessment shall be levied. The lateral assessment shall be levied, less the cost of installation of the sump pump. Such cost to be approved by the City. In the event the cost of the sump pump exceeds the lateral assessment, the City shall not be responsible for the additional cost.

All voted in the affirmative.

6. Lots where the elevation of the lateral or lot is such that the cost of connection is excessive and the lot can be more feasibly served by subsequent installation of laterals in another location.

It was moved by Krause and seconded by Peterson that the following policy be adopted in regards to objection No. 6:

Policy

Trunk assessment shall be levied. Such property shall be eliminated from the lateral benefit area and the assessment deleted.

All voted in the affirmative.

It was moved by Peterson and seconded by Krause that the following policy be adopted in regards to all four Sewer Improvement Districts:

Policy

That the City apply the policy adopted at this meeting to all properties in the four sewer improvement districts, regardless of whether or not a formal protest has been filed, or regardless of whether or not the property owner has appeared at the protest meeting of September 29, 1950; that the City, in future years, waive any right it might have to adjust assessments levied because of failure to so personally appear or file written protest; that the protest hearing be adjourned; that the City Manager correct the assessment roll as originally made and present it to the City Council on or about October 6, 1950 for final settlement by the Council and for certification by the Mayor.

All voted in the affirmative."

Certification

I, B. W. Boeke, keeper of the minutes of the City Council, do certify that the foregoing are true excerpts from volumes 7 and 8, Minutes, City of Anchorage, Alaska, in regard to the construction and assessment of a sewer line in the area known as Sewer Improvement District No. 1.

[Seal] /s/ B. W. BOEKE,
City Clerk.

[Endorsed]: Filed Dec. 26, 1950.

[Title of District Court and Cause.]

MOTION IN RESPONSE TO PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT

Defendants move as follows:

I.

That plaintiffs' motion for summary judgment be dismissed.

II.

This motion is based upon the fact that in this action there are many genuine issues as to material facts; the existence of genuine issues as to material facts is shown by the complaint, answer and affirmative defenses on file herein, affidavits in support of plaintiffs' motion, and the attached affidavits of the defendant City of Anchorage.

III.

This motion is further based upon the fact that the supporting papers attached to plaintiffs' motion for summary judgment are not what they purport to be, as shown by the attached affidavit of John S. Hellenthal, Robert E. Sharp, and Betty Kerby, Acting City Clerk, and do not raise any issues of law in this case.

Dated at Anchorage, Alaska, this 4th day of January, 1951.

/s/ JOHN S. HELLENTHAL.

Subscribed and sworn to before me this 4th day of January, 1951.

[Seal] /s/ ESTHER THOMPSON,
Notary Public for Alaska.

My Commission expires 9-10-52.

Acknowledgment of Service attached.

AFFIDAVIT OF ROBERT E. SHARP, BETTY
KERBY, and JOHN S. HELLENTHAL

United States of America,
Territory of Alaska—ss. .

Robert E. Sharp, Betty Kerby, and John S. Hellenthal, being first duly sworn, under oath, each for himself and not one for the other, depose and say:

1. That we are City Manager, Acting City Clerk, and City Attorney for the City of Anchorage, respectively.

2. That the 16 page paper entitled "Excerpts from the Minutes of the Common Council of the City of Anchorage in regard to the Trunk Outfall Sewer and Sewer in the South Addition to the Original Townsite of Anchorage" is not the full written record from the minutes of the Anchorage City Council in regard to the construction and assessment of a sewer line in the area known as Sewer Improvement District No. 1, as certified by B. W. Boeke, City Clerk, on page 16 thereof; that omitted from said excerpts are all references to the awarding of the contract with the Stateside Construction Company by the City of Anchorage on the 29th of June, 1949 and on the 30th of June, 1949; that further omitted therefrom are any and all reference to the passage and enactment of ordinance 1007 by the Anchorage City Council on the 20th of April, 1949; that further omitted are many references to this matter occurring after October 4, 1950, during which period the assessment roll was finally settled; that

plaintiff's motion includes no minutes after October 4, 1950; that there may be further material omissions, but affiant Betty Kerby has not had adequate opportunity to check the voluminous records of council meetings completely in order to ascertain other omissions.

3. That Ordinance No. 203 of the City of Anchorage and Ordinance No. 216 of the City of Anchorage, attached to plaintiffs' motion for summary judgment were repealed and no bonds were sold pursuant to their terms; that this repeal was accomplished on 19 October, 1949, and said ordinances have no relation to the levying of the special assessment for sewer improvement in the area known as Sewer Improvement District No. 1.

4. That whatever protest was made by Ashleys failed to specify any reason why the assessment was claimed void.

5. That the defendants have a real and meritorious defense to this action as shown in the answer and affirmative defenses on file herein.

6. That involved in this controversy are issues of great public moment. That the amount involved if these assessments are determined to be illegal is approximately a quarter of a million dollars, which amount must be paid by the taxpayers in some form.

7. That but thirty days have elapsed since the filing of this action. That it is impossible to analyze the many issues of fact and law herein presented in the time allowed.

8. That petitions for the sewer construction which is the subject of this action were all in the

form of the "Explanation of Sewer Assessments" and "Petition for Sewers" which are attached hereto and made a part hereof.

Dated at Anchorage, Alaska, this 4th day of January, 1951.

/s/ ROBERT E. SHARP,
/s/ BETTY KERBY,
/s/ JOHN S. HELLENTHAL.

Subscribed and sworn to before me this 4th day of January, 1951.

[Seal] /s/ ESTHER THOMPSON,
Notary Public for Alaska.

My Commission expires 9-10-52.

EXPLANATION OF SEWER ASSESSMENTS

History of this Sewer Improvement; Bonds;
Assessment; Construction Contract

On March 27, 1947 the property owners of Anchorage voted to spend: (a) \$225,000 for a trunk outfall sewer line located along First Avenue and emptying into Knik Arm, and for another trunk outfall sewer line along Chester Creek (See attached map particularly Sewer Improvement District No. 4); (b) \$225,000 to expand the existing sewer system (See Map, particularly Sewer Improvement Districts Nos. 1, 2 and 3).

Both of the above improvements were to be financed by the issuance of \$450,000 bonds, which bonds were sold April 1, 1949, and further the City

is authorized to collect special assessments to defray part of the cost of the improvements.

The contracts for the above improvements will soon be awarded and since these improvements will benefit certain property owners in the City greatly, the City has determined in accordance with territorial law and the ordinances of the City of Anchorage to assess two-thirds of the cost of these improvements to the property owners so specially benefited by the improvement.

Four "Sewer Improvement Districts" Created

Plans for the sewer improvements have been drawn and are available for inspection in the office of the City Engineer, City Hall, Anchorage. In order to facilitate petitioning for and the collection of the various special assessments that will be necessary to finance these projects, the area to be benefited by the sewers have been divided into four "sewer improvement districts", which districts appear on the map attached to the accompanying petition. The map shows the types of lateral and trunk sewers that will be installed in each district, if the consent of the property owners is obtained.

Lateral Sewers

In Sewer Improvement Districts Nos. 1, 2, 3 and 4 there are located lateral sewers. The lateral sewers benefit particular blocks and are very local in character. Two-thirds of the cost of these lateral sewers will be assessed against the owners particularly benefited and these lots so specially benefited are indicated on the attached map by being criss-crossed in red.

Trunk Sewers

In Sewer Improvement Districts Nos. 1 and 4, in addition to the lateral sewer, there are located trunk sewers which benefit a much greater area than the lateral; hence two-thirds of the cost of these trunk sewers will be apportioned over a greater area, which area is indicated on the attached map by green criss-crossing.

Both Lateral and Trunk Sewers Benefit Certain Areas

It will be noticed that in Sewer Improvement Districts Nos. 1, 2 and 4 some lots are criss-crossed in both green and red. The owners of these lots are being requested to pay their proportionate share of both the two-thirds cost of the trunk sewers benefiting their properties and the lateral sewers benefiting their properties.

Estimate of Cost

Until the final bid is awarded for the sewer project, it is not known what the actual assessable cost to the property owners will be. The City Engineer estimates, however, that the cost of sewer improvements in the four Sewer Improvement Districts will be as follows:

Estimate

Note: This estimate is property owner's share (City's $\frac{1}{3}$ excluded).

Sewer Improvement District No. 1 (50x140 foot Lot): Lateral benefit, \$148.00; trunk benefit, \$42.00; total \$190.00.

Sewer Improvement District No. 2 (50x140 foot Lot): Lateral benefit, \$163.00; trunk benefit, \$24.00; total, \$187.00.

Sewer Improvement District No. 3 (50x140 foot Lot): Lateral benefit, \$149.00; trunk benefit, none; total \$149.00.

Sewer Improvement District No. 4 (50x140 foot Lot): Lateral benefit, \$223.00; trunk benefit, \$42.00; total, \$265.00.

These estimates may vary, but it is believed from all information available to the City at the present that these estimates are reasonably correct.

Time of Payment

The assessments contemplated, if the necessary petitions are secured will be levied as soon as the improvements are complete and the final cost is known. The assessments will be payable in three annual installments for those who choose to pay them in this manner. It is believed that property owners who desire to pay their assessment in one lump sum will be allowed a discount of at least $3\frac{3}{4}\%$, if they so elect.

Method of Signing

If a person owning property in one of the four sewer improvement areas desires to obtain a sewer, he should sign the attached petition as the owner of the property in the space above the line designated for his lot and stating the block thereof. He will thus

request that the sewer assessment or assessments, depending on the location of his property, be levied against his property.

Definition of Owner

The owner of a property is in practically all cases the person whose name appears on the tax rolls of the City as such owner. The tenant or occupier is not necessarily the owner. A person may sign for the owner if he has the written power of attorney from the owner granting him the right to sign the petition. If a person signs without written power of attorney for an owner he is guilty of forgery. Likewise, one who assists one not the owner to sign the attached petition or any similar petition is guilty of forgery.

Procedure after Petition is Presented to Council

If this petition is signed by all of the owners of at least one-half in value of the property specially benefited by the improvement and the Council so finds this to be true and further finds that the requested improvement should be made, two-thirds of the cost will be assessed against the various property owners.

Careful account will be kept of all expenses of these improvements and when the improvements are completed the City Council will assess two-thirds of the cost thereof against the various properties benefited on a special assessment roll similar to the general property tax roll.

When the assessment is thus entered on the roll the City Council will fix a time to hear objections to the amount of the assessments, if there are any, and mail a notice to every property owner against whose property an assessment is made, stating the amount of the assessment against his property and the time fixed for hearing objections.

At the hearing persons can complain about their assessment and if it is in error, it will be corrected. After corrections are made, the assessment roll will be signed by the Mayor, the assessment will be levied against the property and time for payment and manner of payment and penalties for delinquency will be determined.

After the time of payment, etc., is determined, each owner of property assessed will be notified in writing of the amount of his assessment, the designation of the property assessed, the time of delinquency and the amount of the penalty for late payments and provision for installment payments in three annual installments.

Thereafter, if the assessments are not paid they shall be collected in the same manner as general taxes.

DONALD R. WILSON,
City Manager,
City of Anchorage.

PETITION FOR SEWERS

We, the undersigned, pursuant to the provisions of Title 16, Chapter 1, Section 81, ACLA 1949, and the ordinances of the City of Anchorage, hereby peti-

tion the City of Anchorage to construct necessary sewer facilities, including trunk and lateral sewers, to serve the following properties, of which we are among the owners, and which are included in the following described Sewer Improvement Districts:

Sewer Improvement District No. 1

Beginning at the intersection of 12th Avenue and "U" Street, where the corporate limits of the City meets the boundary of the Alaska Railroad Terminal Reserve; thence south along "U" Street to a point 187.50 feet from the intersection of "U" Street and 13th Avenue; thence east parallel to Scenic Way to the northeast corner of Block 47 of the South Addition; thence south along "S" Street a distance of 375 feet; thence southeast to a point midway on the south border of Block 46 of the South Addition, which point is on the south corporate limit; thence east along the corporate limits of the City or 16th Avenue to where it intersects with "C" Street; thence north along "C" Street to 12th Avenue; thence west 500 feet along 12th Avenue; thence north at right angles to 11th Avenue; thence west along 11th Avenue to "F" Street; thence south along "F" Street to 12th Avenue; thence west along 12th Avenue to "G" Street; thence north along "G" Street to 11th Avenue; thence west along 11th Avenue to "H" Street; thence south on "H" Street to 13th Avenue; thence west 750 feet along 13th Avenue; thence north at right angles to 12th Avenue; thence west along 12th Avenue to "L" Street; thence north 150 feet along "L" Street; thence west 300 feet at

right angles through the alley to "M" Street; thence north on "M" Street to 11th Avenue; thence west on 11th Avenue to "N" Street; thence south on "N" Street 150 feet; thence west at right angles through the alley to the extension of "R" Street; thence north at right angles 150 feet to 11th Avenue; thence west along 11th Avenue to the east border of the Alaska Railroad Terminal Reserve; thence southwest along the east boundary of the Alaska Railroad Terminal Reserve to the point of beginning.

Sewer Improvement District No. 2

All and whole of Blocks 7A, 7B, 6A and 6B of the Third Addition to the Original Townsite of the City of Anchorage, Alaska, and Blocks 8 and 9 of the Original Townsite of said City.

Sewer Improvement District No. 3

All lots North of Lots 7 and 24 in Block 16 of the East Addition to the City of Anchorage and all of Block 18 of said East Addition to the City of Anchorage.

Sewer Improvement District No. 4

Beginning at a point in the northeast corner of Block 36 of the East Addition of the City of Anchorage or at the corner of First Avenue and Gambell Street; thence south along the east corporate line of the City of Anchorage to the corner of 4th Avenue and Gambell Street; thence west along 4th Avenue to a point 200 feet west of the northwest corner of the intersection of Cordova Street and 4th Avenue; thence north at right angles to 2nd Avenue; thence west along 2nd Avenue to "E" Street; thence north

along "E" Street 150 feet; thence west at right angles through the alley a distance of 200 feet; thence north at right angles 150 feet to 1st Avenue; thence east along 1st Avenue to the point of beginning.

We hereby agree to the levy of a special assessment against our properties, which will be specially benefited by said sewers, in an amount equal to two-thirds of the cost thereof. We represent that we are the owners of at last one-half in value of the property to be specially benefited by these sewer improvements. We agree to pay said two-thirds of the cost in annual installments over a period of three (3) years. We understand that our share of the assessable cost is to be based upon the area of our lots and the frontage thereof.

We further understand that those of us who own properties shaded in red on the attached map (See Ex. A) will all pay our two-thirds share of the cost of lateral sewers or those serving particular streets. Those of us who own properties in areas which are shaded both red and green further understand that in addition to the cost of lateral sewers we will pay two-thirds of the cost of the trunk sewer benefiting our property; there being three such trunk sewers, two in Sewer Improvement District No. 1 (along 15th Avenue and in Chester Creek valley) and one in Sewer Improvement District No. 4 along First Avenue, all such trunk sewers being indicated on the Map, or Ex. A. We further understand that those of us owning property in the area shaded only in green will be assessed for only our share of the two-thirds cost of the trunk sewers, as

described in the preceding sentence, and, which benefit our properties.

We represent that we have read or have had explained to us the paper attached to this petition, entitled "Explanation of Sewer Assessments."

Name of Property Owners per tax rolls		Assessed value to be filled in by City Assessor
Lot and Block		
.....
.....
.....

[Endorsed]: Filed Jan. 4, 1951.

[Title of District Court and Cause.]

ANSWER

The defendants in answer to plaintiffs' complaint allege:

I.

That they do not have sufficient information to form a belief as to the verity of Paragraphs I and VI of said complaint and for that reason alone they deny same.

II.

Admit the allegations of Paragraphs II, III, IV and V of plaintiffs' complaint.

III.

They deny that portion of Paragraph VII of said complaint which states that the defendant City of Anchorage "did wrongfully and unlawfully and without the consent of the plaintiffs * * *"; they admit the other allegations of said paragraph.

IV.

With reference to Paragraph VIII of said complaint, the defendants admit that by resolution and notice of special assessment the defendant City of Anchorage claims a first, prior and paramount lien upon Lot 10 of Block 42A of the South Addition to said City of Anchorage; except as herein expressly admitted, the defendants deny each and every allegation of said Paragraph VIII.

V.

Defendants deny each and every allegation of Paragraphs IX and X of said complaint.

Further Answering the Complaint of the Plaintiff and as an Affirmative Defense Thereto Defendants Allege:

VI.

That by virtue of Ordinance No. 193, passed and approved on 5 March 1947 a special election was held in the City of Anchorage and the two following propositions submitted to the voters thereat:

“Proposition 4: Shall the City construct two trunk outfall sewer lines to serve the City of Anchorage, and in payment of the construction costs thereof issue \$225,000 in General Obligation Bonds of said City?

“Proposition 5: Shall the City extend sewer lines in the Third and South Additions to the Original Townsite of the City of Anchorage, and in payment of the construction costs thereof issue General Obligation Bonds of the City of Anchorage in the sum of \$225,000 and in ad-

dition to the payment thereof from tax revenues of the City of Anchorage, pledge the proceeds of any special assessments which the City may by law assess and collect for such special local improvements?"

That said propositions carried at said election; that by virtue of Ordinances 1005 and 1007, both passed and approved 20 April 1949 the City of Anchorage borrowed money and issued bonds in the total amount of \$450,000 for the purpose of constructing the improvements authorized by the voters at said election; that Ordinance 1007 stated that special assessments would be levied for the purpose of partially financing said sewer improvements.

VII.

That on February 10, 1949 by resolution the City Council decided as follows:

"Meeting was called to order by Acting Mayor Barber and the following members reported present: Barber, Krause, Rozell, Setchfield, Summers. Absent: Mayor Loussac and Councilman Scavenius.

"The method of assessment for the Trunk Outfall Sewer Project and Lateral Sewer Extensions and maturity dates for bonds to be issued to finance these projects was discussed.

"It was decided that, inasmuch as the Trunk Outfall Sewer was designed with sufficient capacity to permit expansion of the lateral extension system, a special assessment would not be levied except in those cases where sewer services will

be directly connected to the trunk sewer line. In these cases property owners will be assessed an amount equal to the normal cost of installing a lateral sewer line with sufficient capacity to serve their property.

“It was also decided that an assessment equal to the two-thirds of the cost of installing the Lateral Sewer Extensions would be levied.

“The City Attorney was instructed to draft an ordinance to promulgate these decisions and the Comptroller instructed to compute bond maturity dates accordingly.

“The previously established policy regarding installation of water mains and assessment for water connections was briefly discussed. It was decided that maturity dates for the bonds to finance the rehabilitation and water distribution system projects would be established on a long term basis consistant with the amounts thereof.

“Meeting adjourned 7:45 p.m.”

that on February 2, 1949 the City Council by resolution determined as follows:

“The City Comptroller requested that a policy be determined on the payment of paving, water and sewer assessments by the property owners.

“It was moved by Rozell and seconded by Summers that property owners be given 5 years in which to pay for paving assessments in 5 equal installments and 3 years on water and sewer assessments. All voted in the affirmative.”

VIII.

That between April 1, 1949 and July 1, 1949 and prior to the award of the contract for the construction of the sewer improvements in question, petitions were circulated in accordance with territorial law and city ordinance and the requisite number of qualified persons signed said petitions in accordance with law and they were filed with the City Clerk during said period in accordance with law; that no signatures were obtained after July 1, 1949.

IX.

That on July 1, 1949 a contract for the construction of sewer improvements in the areas known as Sewer Improvement District No. 1 and the areas known as Sewer Improvement Districts 2, 3 and 4 was signed by the Stateside Construction Company and the City of Anchorage; that bond in connection with said contract was furnished on July 15, 1949 and the contract was approved by the City Attorney on July 15, 1949; the construction work under the terms of said contract was commenced on about July 15, 1949 and continued thereafter.

X.

That in the midst of the sewer construction, and on 2 March 1950, on second reading, Resolution No. 545 was passed and approved by the City Council.

XI.

That on 13 September 1950 the City of Anchorage passed and approved Resolution No. 570, after first reading on September 6, 1950, in compliance with territorial and municipal law governing special

assessments and assessed the cost of the improvement against the various tracts of the real property in proportion to the benefit received by each and established the date for hearing objections to said assessments and directed the City Clerk to notify by mail each owner of properties against which an assessment was made in accordance with law, which notification was duly accomplished.

XII.

That on September 27, 1950 objections were heard to the special assessment levied by Resolution No. 570; that at said hearing plaintiff Ashley made no specific objection to the said assessment other than to state "I ask that Council assess a general tax and the whole sewer improvement be taken out of the General Tax Fund", and failed to point out errors or any inequalities that may have existed in the roll and further failed to submit reasons for amendments and corrections and have continued to so fail.

XIII.

That the assessment roll was completed in accordance with law and with Resolution No. 577 passed on October 18, 1950, and notice of assessment with postage prepaid was mailed to the owner of each property assessed by the City Clerk, time of delinquency was fixed and statutory requirements were complied with; that pursuant to law the Clerk's affidavit of said mailing has been filed.

XIV.

That the members of the City Council of Anchorage, Alaska, did not change and could not have

changed through election between April 6, 1949 and November 1, 1950.

If the Illegality Complained of in Plaintiffs' Complaint Consists of a Defect Regarding the date of Passage of Resolution No. 545 Above Referred to, Defendants Plead as a Second Affirmative Defense, as follows:

XV.

That plaintiffs knew that the improvement was being made, and that the sewers were being constructed and they possessed such knowledge from July 1, 1949 and thereafter; that plaintiffs knew that the improvement was contemplated and authorized at all times after the 27th of March, 1947 when a special election was held in the City of Anchorage pursuant to the terms of Ordinance No. 193, passed and approved 5 March 1947, heretofore referred to in this answer; that plaintiffs knew that the sewer improvement was contemplated and authorized on 20 April 1949 when Ordinance 1007 was passed and approved, said ordinance having provided for the pledging of amounts raised by special assessments toward repaying sewer bonds; that plaintiffs had actual knowledge of the improvement and of the fact that it was to be financed by special assessments at all times after 27 March 1947; that the sewer in the alley adjacent to plaintiffs' property was placed there in the first week of August of 1949; that plaintiffs acquiesced in said construction.

XVI.

That plaintiffs had knowledge at all times after

27 March 1947 that the public authorities intended and were making the improvement upon the faith that the cost thereof was to be paid by the owners of real property specially benefited by the improvement in proportion to the benefits so received by each tract of land, and that an assessment for that purpose was contemplated, and that it was not to be borne from the General Fund.

XVII.

That if the defect complained of in the proceedings under which the improvement was being made consisted of late passage of Resolution No. 545, i.e., passage thereof on March 2, 1950 instead of the first week of July, 1949, this defect was a non-jurisdictional defect based upon a statute directory in nature and the plaintiffs did have knowledge of such infirmity or defect at all times after July 1, 1949.

XVIII.

That special benefit accrued to the plaintiffs' property over and above that enjoyed by the citizens of Anchorage generally in that a sewer was constructed in the alley adjacent to plaintiffs' property which construction immediately enhanced the value of said property by reason of its availability; that the construction of an outfall sewer, which was constructed, also further specially enhanced the value of plaintiffs' property by reason of its availability.

XIX.

That on March 2, 1950, plaintiffs did not appear and protest any claimed infirmity or defect in the proceedings at the time when Resolution No. 545

was duly passed and approved after a prior first reading thereof, nor did they appear at the protest hearing called on September 27, 1950, except as heretofore alleged in these pleadings.

XX.

That by reason of the premises plaintiffs are estopped from the right to the relief prayed for in the complaint and have waived such right, if any they had; that plaintiffs have an adequate remedy at law; that plaintiffs have failed to exhaust the administrative and legal procedures available to them; that plaintiffs are guilty of laches in their application for claimed relief.

XXI.

That defendant City of Anchorage has at all times herein mentioned acted in good faith in this matter; that no objections to the method or manner of assessing for this project were raised prior to September 27, 1950 by anyone.

XXII.

That certified copies of all resolutions and ordinances pleaded herein are attached hereto and expressly incorporated in this answer and all affirmative defenses as if set out in full herein.

Wherefore, defendants pray that plaintiffs take nothing by their complaint and that defendants recover of plaintiffs their costs and disbursements herein.

/s/ JOHN S. HELLENTHAL,
Attorney for Defendants.

United States of America,
Territory of Alaska—ss.

Robert E. Sharp, first being duly sworn both on behalf of the City of Anchorage and on behalf of the individual defendants herein, namely, Z. J. Loussac and B. W. Boeke and himself, says:

That he is the City Manager of the City of Anchorage, a municipal corporation, and eligible to be served with process on behalf of said corporation; that he has read the foregoing Answer and knows the contents thereof; that the same is true to the best of his knowledge and belief.

/s/ ROBERT E. SHARP.

Subscribed and sworn to before me at Anchorage, Alaska, this 4th day of January, 1951.

[Seal] /s/ JOHN S. HELLENTHAL,
Notary Public for Alaska.

My Commission expires Oct. 8, 1953.

Acknowledgment of Service attached.

ORDINANCE No. 193

Ordinance No. 193 of the City of Anchorage: To establish the date of a special election; to prescribe the qualifications of voters to be eligible to vote at said election; to designate the judge and clerks of such election; to provide for notice thereof and for the establishing of polling places; and to provide for the submission to said electors the following propositions:

* * * * *

Proposition 4: Shall the City construct two trunk outfall sewer lines to serve the City of Anchorage, and in payment of the construction costs thereof issue \$225,000 in general obligation bonds of said city?

Proposition 5: Shall the City extend sewer lines in the Third and South Additions to the original town-site of the City of Anchorage, and in payment of the construction costs thereof issue general obligation bonds of the City of Anchorage in the sum of \$225,000 and in addition to the payment thereof from tax revenues of the City of Anchorage, pledge the proceeds of any special assessments which the City may by law assess and collect for such special local improvements?

* * * * *

All in compliance with and as authorized by the Act of Congress of the United States, approved June 18, 1946, (H. R. 5112).

Section 1: Pursuant to the Act of Congress of the United States entitled "An Act to authorize the City of Anchorage, Alaska, to issue bonds in a sum not to exceed Five Million Dollars for the purpose of constructing, reconstructing, improving, extending, bettering, repairing, equipping, or acquiring public works of a permanent character and to provide for the payment thereof and for other purposes", (H.R. 5112) passed and approved June 18, 1946, a Special Election is hereby called to be held in the City of Anchorage, Alaska, on the 27th day of March, 1947.

Section 2: That at said Special Election there shall be submitted to the qualified electors of said

City, authorized to vote at said election as hereinafter provided, the following questions:

* * * * *

Proposition 4: Shall the City construct a trunk outfall sewer line to serve the Third and South Additions to the Original Townsite of the City of Anchorage, the terminus of which line shall be near the mouth of Chester Creek, and a trunk outfall sewer line along First Avenue of the City of Anchorage, terminus of which line shall be on Knik Arm, adjacent to the City of Anchorage, and for the purpose of constructing said sewer outfalls and in payment of the construction costs thereof issue General Obligation bonds of said City in the sum of \$225,000, which bonds shall mature serially in from two to twenty years from date, and bear interest at a rate of not to exceed 5% per annum, as authorized by Act of Congress of the United States, H.R. 5112, approved June 18, 1946?

Proposition 5: Shall the City of Anchorage, Alaska, expand existing sewer facilities in the City of Anchorage, Alaska, and, for the purpose of expanding the present sewage system located in the said City, issue General Obligation bonds of said City in the sum not to exceed \$225,000 in payment of the costs thereof, which bonds shall mature serially in from two to twenty years from date, and bear interest at a rate not to exceed 5% per annum, and pledge the proceeds of any special assessments which the City may by law assess and collect for such special local improvements for the payment of the principal and interest of said bonds, all as authorized

by the Act of Congress of the United States, H.R. 5112, approved June 18, 1946?

* * * * *

Section 3: All the qualified electors of the City of Anchorage whose names appear on the assessment roll of record, which roll shall be specially prepared for this election, for purposes of municipal taxation and no other persons shall be entitled to vote at said election. No special registration for this election prior to the date thereof shall be required but provision shall be made for registration of each voter at the time of receiving his or her ballot.

Section 4: Persons hereinafter named are designated as judges and clerks respectively for the voting precincts in the City of Anchorage as follows:

Precinct No. 1: Judges: David Strandberg, John M. Brown, Cecil Burgan; Clerks: Doris B. Reherd, Ada Snider.

Precinct No. 2: Judges: Margaret Renfrew, Delphine Abbott, G. E. Nitz; Clerks: Frank Bayer, Lucille Adams.

Section 5: For this election, two precincts are created, which precincts shall be defined as follows:

Precinct No. 1 shall comprise all of that area within the City of Anchorage lying East of the center line of F Street.

Precinct No. 2 shall comprise all that area of the City of Anchorage lying West of the center of F Street.

The polling places for the special election to be held under the provisions of this Ordinance shall be as follows:

Precinct No. 1: City Hall.

Precinct No. 2: Community Building, Lot 2, Block 28.

Section 6: Notice of the said election shall be given by posting written notice thereof at the United States Post Office in said City, on the bulletin board in the City Hall in said City, and at the corner of 4th Avenue and "E" Street in said City, all of which places are hereby found and declared to be conspicuous places within the corporate limits of said City. Said notice of election shall be posted at said designated places not less than twenty days prior to said election.

Section 7: Said notice shall be signed by the Mayor of said City and attested by the City Clerk, and shall be in substantially the following form:

Notice of Special Election

A Special Election will be held in the City of Anchorage, Alaska, on the 27th day of March, 1947, for the purpose of submitting to the voters listed on the last assessment roll of record of said City for purposes of municipal taxation, the following questions:

* * * * *

Proposition 4: Shall the City construct a trunk outfall sewer line to serve the Third and South Additions to the Original Townsite of the City of Anchorage, the terminus of which line shall be near the mouth of Chester Creek, and a trunk outfall sewer line along First Avenue of the City of Anchorage, terminus of which line shall be on Knik Arm, adjacent to the City of Anchorage, and for the pur-

pose of constructing said sewer outfalls and in payment of the construction costs thereof issue General Obligation bonds of said City in the sum of \$225,000, which bonds shall mature serially in from two to twenty years from date, and bear interest at a rate of not to exceed 5% per annum, as authorized by Act of Congress of the United States, H.R. 5112, approved June 18, 1946?

Proposition 5: Shall the City of Anchorage, Alaska, expand existing sewer facilities in the City of Anchorage, Alaska, and, for the purpose of expansion of the present sewerage system in said city issue General Obligation bonds of said City in the sum not to exceed \$225,000 in payment of the costs thereof, which bonds shall mature serially in from two to twenty years from date, and bear interest at a rate not to exceed 5% per annum, and pledge the proceeds of any special assessments which the City may by law assess and collect for such special local improvements, all as authorized by the Act of Congress of the United States, H.R. 5112, approved June 18, 1946?

* * * * *

The polling place will be at the City Hall and the Community Hall on Lot 2 in Block 28 in the City of Anchorage, Alaska, and the polls will be open from 8:00 a.m. until 7:00 p.m. of said day.

Those persons who are citizens of the United States, over the age of twenty-one years, and who are and have been bona fide residents of the Territory of Alaska continuously for a period of one year immediately preceding this election, and who have

been likewise bona fide residents within the City of Anchorage corporate limits for a period of at least six months prior to the date of this election, who are able to read the Constitution of the United States in the English language, and to write the English language, and whose names appear on the tax assessment roll of record of the City of Anchorage for purposes of municipal taxation, shall be qualified to vote at said election.

No special registration for this election prior to the date thereof shall be required, but provision shall be made for registration of each voter at the time of receiving his or her ballot.

* * * * *

If 51% or more of the voters voting at said election shall cast their votes in favor of proposition No. 4, hereinbefore set forth, then the Common Council of the City of Anchorage proposes to issue General Obligation bonds of said City in the sum of \$225,000, at a rate of interest not to exceed 5% per annum, to pay for construction and installation of said trunk outfall sewer lines.

If 51% or more of the voters voting at said election shall cast their votes in favor of proposition No. 5, hereinbefore set forth, then the Common Council of the City of Anchorage proposes to issue General Obligation bonds of said City in the amount of \$225,000, at a rate of interest not to exceed 5% per annum, to pay for the expansion of said sewerage facilities and to pledge the proceeds of any special assessments which the City may by law assess and collect to secure the payment of said bonds.

* * * * *

The Council, upon approval of all said propositions, or any one or more thereof, further proposes to issue said General Obligation Bonds to mature serially in from two to twenty years and offer said bonds for sale on competitive public bid.

The Council further proposes, by subsequent ordinance, to fix the interest rates, terms, conditions and maturities and redemption rights of said bonds and to establish special funds in which the revenues from said utilities, or as much thereof as will be necessary, shall be held in trust to pay the principal and interest of said bonds as the same accrue.

The Council further proposes that such ordinance or ordinances shall contain such other provisions as may be deemed by the Council necessary and expedient in order to facilitate the sale of said bonds or any portion thereof.

This notice is given pursuant to an Act of Congress approved June 18, 1943, and to Ordinance No. 193 of the City of Anchorage, Alaska.

.....

Mayor.

Attest:

.....

City Clerk.

Section 8: The form of the ballot shall consist of a separate statement of the propositions set forth in Section 2 of this Ordinance, and each proposition so stated shall be concluded by the following wording:

“For—Proposition 1”

“Against—Proposition 1”

Section 9: All the provisions of the laws of the United States and of the Territory of Alaska, and the general ordinances of the City of Anchorage relating to registration of voters, the manner of conducting elections, and the canvass of the returns thereof, shall, insofar as applicable, and except as otherwise specifically provided herein, govern the election to be held pursuant to this Ordinance.

Section 10: The Common Council will act upon the propositions approved at said election, and by subsequent ordinance implement the sale of the bonds and proceed as soon as practicable with the improvements authorized by the voters at said election.

Section 11: This Ordinance shall be published in the Anchorage Times, a newspaper published at Anchorage, Alaska, for two consecutive weeks.

Section 12: This Ordinance shall take effect immediately upon its passage and approval, an emergency having been duly declared.

Passed and approved this 5th day of March, 1947.

[Seal] /s/ FRANCIS C. BOWDEN,
Mayor.

Attest:

 /s/ T. E. DOWNES,
City Clerk.

Certificate

I, B. W. Boeke, Clerk of the City of Anchorage, Territory of Alaska, do hereby certify that the foregoing ordinance is a true, full and correct copy of Ordinance No. 193, duly adopted by the City Coun-

cil of said City on the 5th day of March, 1947, and that the same has been entered in the minutes of the meeting of said Council for said date.

[Seal]

B. W. BOEKE,

City Clerk.

City of Anchorage, Alaska

ORDINANCE No. 1005

An Ordinance of the City of Anchorage, Alaska, confirming the result of a Special Election held in the City on March 27, 1947, authorizing the issuance of General Obligation Bonds in the sum of \$225,000 for the construction of two trunk outfall sewer lines, providing the date, form, terms and maturities of said bonds and for unlimited annual tax levies to pay the principal and interest thereof, and confirming their sale.

Whereas, at a special election held in the City of Anchorage, Territory of Alaska, on March 27, 1947, pursuant to Ordinance No. 193 of the city, the qualified electors thereof authorized the issuance of general obligation bonds in the sum of \$225,000 for the purpose of providing funds to construct a trunk outfall sewer line to serve the Third and South Additions to the original town site of the city, the terminus of said line to be near the mouth of Chester Creek, and a trunk outfall sewer line along First Avenue, the terminus of said line to be on Knik Arm adjacent to the city; and

Whereas, it is deemed necessary and to the best in-

terest of the city and its inhabitants that said bonds be now issued and sold, to provide the funds necessary for said purposes;

Now, Therefore, Be It Ordained by the Common Council of the City of Anchorage, Territory of Alaska, as follows:

Section 1. That the adoption by the qualified electors of the city at a special election held therein on March 27, 1947, of a proposition providing for the issuance of general obligation bonds of the city in the total principal sum of \$225,000 for the purpose of providing funds to construct a trunk outfall sewer line to serve the Third and South Additions to the original town site of the city, the terminus of said line to be near the mouth of Chester Creek, and a trunk outfall sewer line along First Avenue, the terminus of said line to be on Knik Arm adjacent to the city, be and the same is hereby in all respects ratified and confirmed.

Section 2. The officials of the city are hereby authorized and directed to proceed with the construction and installation of said two trunk outfall sewer lines, and are authorized and directed to cause to be issued and sold at this time the \$225,000 of general obligation bonds authorized by the qualified electors of the city to provide funds for said purposes at a special election held on March 27, 1947.

* * * * *

Certificate

I, B. W. Boeke, Clerk of the City of Anchorage, Territory of Alaska, do hereby certify that the fore-

going ordinance is a true and correct copy of an ordinance duly adopted by the Common Council of said city and approved by its Mayor on the 20 day of April, 1949, and that the same has been entered in the minutes of the meeting of said Council for said date.

B. W. BOEKE,
City Clerk.

City of Anchorage, Alaska

ORDINANCE No. 1007

An Ordinance of the City of Anchorage, Alaska, confirming the result of a Special Election held in the city on March 27, 1947, authorizing the issuance of General Obligation Bonds in the sum of not to exceed \$225,000 to expand existing sewer facilities in the city; providing the date, form, terms and maturities of said bonds and for unlimited annual tax levies to pay the principal and interest thereof; and confirming their sale.

Whereas, at a special election held in the City of Anchorage, Territory of Alaska, on March 27, 1947, pursuant to Ordinance No. 193 of the city, the qualified electors thereof authorized the issuance of general obligation bonds in the sum of not to exceed \$225,000 for the purpose of providing funds to expand the present sewage system located in the city; and

Whereas, it is deemed necessary and to the best interest of the city and its inhabitants that all of

said bonds so authorized be now issued and sold to provide the funds necessary for said purposes;

Now, Therefore, Be It Ordained by the Common Council of the City of Anchorage, Territory of Alaska, as follows:

Section 1. That the adoption by the qualified electors of the city at a special election held therein on March 27, 1947 of a proposition providing for the issuance of general obligation bonds of the city in the total principal sum of not to exceed \$225,000 for the purpose of providing funds to expand the present sewage system located in the city, be and the same is hereby in all respects ratified and confirmed.

Section 2. The officials of the city are hereby authorized and directed to proceed with the construction and installation of the necessary additions, improvements and extensions to the present sewage system of the city, and are authorized and directed to cause to be issued and sold at this time the \$225,000 of general obligation bonds authorized by the qualified electors of the city to provide funds for said purposes at a special election held on March 27, 1947.

* * * * *

Section 5. The city hereby agrees that as soon as practicable after a legal petition for the construction and installation of the necessary additions, improvements and extensions to the present sewage system of the city has been filed and such work authorized, it will levy assessments against the property specially benefited by such improvements in a total amount not to exceed two-thirds of the cost thereof, payable in not more than five annual in-

stallments, and thereafter collect such installments and deposit the same in the Bond Redemption Fund hereinafter created, for the sole purpose of paying the principal of and interest on the bonds authorized herein.

If said petition is not received and the Common Council of the city creates a sewer improvement district and levies and assesses part or all of the cost of such improvements against the property within such district specially benefited by such improvements, such assessments shall be made payable in not more than five annual installments and, when collected, shall be deposited in said Bond Redemption Fund and shall be used solely for the purpose of paying the principal of and interest on the bonds authorized herein.

* * * * *

Section 9. An emergency is hereby declared to exist and the rules governing the introduction, reading, passage and approval of ordinances are suspended and this ordinance shall take effect immediately upon its passage and approval.

Passed by the Common Council of the City of Anchorage, Alaska, and approved by the Mayor thereof on this 20th day of April, 1949.

CITY OF ANCHORAGE,
TERRITORY OF ALASKA,
By Z. J. LOUSSAC,
Mayor.

Attest:

B. W. BOEKE,
City Clerk.

Certificate

I, B. W. Boeke, Clerk of the City of Anchorage, Territory of Alaska, do hereby certify that the foregoing ordinance is a true and correct copy of an ordinance duly adopted by the Common Council of said city and approved by its Mayor on the 20th day of April, 1949, and that the same has been entered in the minutes of the meeting of said Council for said date.

B. W. BOEKE,
City Clerk.

City of Anchorage, Alaska

RESOLUTION No. 545

Sewer Assessments in Four Districts

Be It Resolved by the City of Anchorage:

1. That the following described sewer districts were created by the City of Anchorage:

Sewer Improvement District No. 1

Beginning at the intersection of 12th Avenue and "U" Street, where the corporate limits of the City meets the boundary of the Alaska Railroad Terminal Reserve; thence south along "U" Street to a point 187.50 feet from the intersection of "U" Street and 13th Avenue; thence east parallel to Scenic Way to the northeast corner of Block 47 of the South Addition; thence south along "S" Street a distance of 375 feet; thence southeast to a point midway on the South border of Block 46 of the South Addition,

which point is on the south corporate limit; thence east along the corporate limits of the City or 16th Avenue to where it intersects with "C" Street; thence north along "C" Street to 12th Avenue; thence west 500 feet along 12th Avenue; thence north at right angles to 11th Avenue; thence west along 11th Avenue to "F" Street; thence south along "F" Street to 12th Avenue; thence west along 12th Avenue to "G" Street; thence north along "G" Street to 11th Avenue; thence west along 11th Avenue to "H" Street; thence south on "H" Street to 13th Avenue; thence west 750 feet along 13th Avenue; thence north at right angles to 12th Avenue; thence west along 12th Avenue to "L" Street; thence north 150 feet along "L" Street; thence west 300 feet at right angles through the alley to "M" Street; thence north on "M" Street to 11th Avenue; thence west on 11th Avenue to "N" Street; thence south on "N" Street 150 feet; thence west at right angles through the alley to the extension of "R" Street; thence north at right angles 150 feet to 11th Avenue; thence west along 11th Avenue to the east border of the Alaska Railroad Terminal Reserve; thence southwest along the east boundary of the Alaska Railroad Terminal Reserve to the point of beginning.

* * * * *

2. That the owners of more than one-half in value of the property to be specially benefited by the installation of sewers in the above-described sewer districts have heretofor, prior to the beginning of construction on said projects, requested in writing that the City assess two-thirds of the cost thereof, namely,

of the cost of construction of necessary sewer facilities, including trunk and lateral sewers, to serve their properties which were described in the petitions, against their real property so specially benefited; that the following tabulation shows the areas where such consents have been obtained and show as to each area the total assessed valuation of property specially benefited, the valuation represented by property owners' signatures on petitions and the percentage of total valuation represented on signed petitions:

Sewer Improvement District No. 1: Total assessed valuation, \$1,608,500.00; signed up valuation, \$923,750.00; per cent of total valuation signed up, 57.42%.

3. That the property to be specially benefited by the sewer improvements within the above-described areas consists of each lot in said above-described areas in proportion to the area thereof; it being hereby found that each lot of real property within the above-described areas is benefited in proportion to its area.

4. That the total value of the property specially benefited by the proposed improvements is as indicated in Par. 2 above; that the total value of the property specially benefited by these improvements owned by persons whose signatures appear on written petitions on file with the City Clerk requesting the particular improvement is as indicated in Par. 2 above; that the percentage of value of the property to be specially benefited by each improvement in each area is as indicated above in Par. 2, and, as indicated, is represented on petitions requesting said improve-

ments; that the requisite petitions signed by all the owners of at least one-half in value of the property specially benefited by the above improvement are on file with the city.

5. That, heretofore, prior to the commencement of construction of the requested improvements above described, and now, the Council finds that the requested improvements are necessary and should be made; that it is necessary that the City construct sewer systems in said above-described areas.

6. The Council hereby finds the above facts stated in paragraphs 1 to 5 inclusive to be the true facts in this matter and hereby expressly makes this finding retroactive to the date of submission of petitions and date of commencement of construction and award of sewer contract to Stateside Construction Company and hereby ratifies and confirms all its prior actions in this matter, expressly its prior resolve that the above-described improvements were necessary and that they should be made and that the petitions were legally sufficient and that requests have been signed by the owners of at least one-half in value of the property to be specially benefited.

7. The Council hereby decides that two-thirds of the cost of the sewer improvements herein mentioned shall be assessed against the real property so specially benefited in proportion to the benefit received by each lot in accordance with the area of each lot in the above-described districts and pursuant to subsection 104.2, Chap. 3, Anchorage General Code; this finding shall ratify and confirm prior findings in this matter made by the Council at the time of re-

ceiving the petitions or requests for the project and shall be retroactive to that time.

8. The City Manager shall keep correct account of all of the expenses of the improvement herein authorized in accordance with sub-section 102.4, Chap. 3, Anchorage General Code.

Publication of this resolution shall be made by posting a copy hereof on the City Hall Bulletin Board, for a period of ten (10) days following passage.

An emergency having been declared and the rules governing the introduction and passage of resolutions having been suspended this resolution is passed and approved by the council of the City of Anchorage this 1st day of March, 1950.

EDWARD G. BARBER,
Acting Mayor, City of Anchorage.

Attest:

B. W. BOEKE,
City Clerk, City of Anchorage.

City of Anchorage, Alaska

RESOLUTION No. 570

Sewer Assessments in Four Districts

Be It Resolved by the Council of the City of Anchorage, Alaska:

1. Resolution No. 545, passed and approved the 1st day of March, 1950, directed the City Manager to proceed with the installation of sanitary sewer facilities in sewer improvement districts Nos. 1, 2, 3

and 4 created by said resolution; said resolution found that the property to be specially benefited by said improvements consisted of each lot in said described sewer improvement districts in proportion to the area thereof; said resolution further directed that two-thirds ($2/3$) of the cost of the improvement be assessed against the property specially benefited in proportion to the benefit received by each lot in accordance with the area of each lot in the aforementioned sewer improvement districts and pursuant to Subsection 104.2, Chapter 3, Anchorage General Code, and that the City Manager keep a record of all the expenses of the improvements.

2. It is hereby found that the cost of said improvement is the sum of \$424,792.29. Attached to this resolution and incorporated herein as if expressly set out in the body hereof and attached hereto as "Exhibit A" is the correct account of said improvements, entitled "Assessment for Sewers Constructed During 1949 and 1950".

3. It is hereby determined that the benefit received by each of the lots contained in the aforementioned sewer improvement districts is as shown in Exhibit A and therefore the amounts so shown should be assessed.

4. The Municipal Assessor is hereby directed to make the above referred to assessment against each of the above referred to lots and enter the same upon an assessment roll by him prepared in connection with this project; which assessment roll shall be prepared in form suitable for the signature of the Mayor and his certification that it is the assessment roll as

finally settled by the City Council; said assessment roll shall contain a brief description or designation of each tract of property, the name of owner or reputed owner thereof, and the amount of the assessment.

5. Objections to said assessments, if any, shall be heard at a special council meeting on September 27, 1950, at eight o'clock p.m. in the Council Chambers, City Hall, Anchorage, Alaska.

6. The City Clerk is hereby directed to send a written notice by mail to each owner of the properties against which such assessment is made, which notice shall state the amount of the assessment against such particular tract and the time fixed by the Council for hearing objections; said notice shall be mailed at least fifteen (15) days before September 27, 1950.

Publication of this Resolution shall be made by posting a copy on the City Hall Bulletin Board for a period of ten (10) days following passage.

First reading—September 6, 1950.

Second reading—September . . , 1950.

Passed and approved this day of September, 1950.

.....

Z. J. Loussac,

Mayor, City of Anchorage.

Attest:

.....

B. W. Boeke, City Clerk.

City of Anchorage, Alaska

RESOLUTION No. 577

Sewer Assessments in Four Districts,
Levy of Assessment

Be It Resolved by the City of Anchorage:

1. That the sewer improvement authorized by Resolutions Nos. 545 and 570 of the City in sewer improvement districts Nos. 1, 2, 3 and 4 and benefiting each lot or tract in said improvement districts is deemed complete and is hereby levied against said lots or tracts in the manner and amounts indicated on pages 1 through 19 of the "Special Sewer Assessment Construction in 1949-1950 of the Tax Rolls and Assessment Rolls of the City of Anchorage, on file in the office of the City Clerk, City of Anchorage in the City Hall, first floor.

2. That the above special assessment has been entered in the special assessment rolls of the City and pursuant to the provisions of Resolution No. 570, passed and approved 13 September 1950, a notice has been sent to each of the property owners specially benefited by the improvement, as indicated on the said tax and special assessment rolls, notifying them of public hearing, which was held in accordance with law; that at the protest hearing as continued all errors in the assessment rolls were corrected and the amounts indicated on said tax and special assessment rolls referred to in paragraph 1 above are the amount finally determined upon as being due from the property owners benefited; that the assessment

roll has been finally settled by the Council and certified by the Mayor.

3. The assessment levied herein shall be paid as herein described on or before 15 January, 1951 and shall become delinquent at midnight, 15 January, 1951. The assessment may be paid in five equal annual installments, said installments to be payable on or before 15 January, 1951, 15 January, 1952, 15 January, 1953, 15 January, 1954 and 15 January, 1955. If any such installment is not paid when due, the entire unpaid portion of said assessment shall immediately become due. No interest shall be charged on unpaid balances of said special assessments if promptly paid as aforescribed. If not fully paid before delinquency, the unpaid assessments shall bear interest at the rate of eight per cent per annum; a penalty of eight per cent shall be added to said unpaid balance of the assessments, not including interest.

4. Within ten days from the passage of this resolution, the City Clerk shall mail with postage prepaid a notice to the owner of each property assessed, which notice shall designate the property, the amount of the assessment, the time of delinquency and the amount of penalty in case of delinquency and inform said person of the policy of the Council with relation to protests over assessments hereby levied.

5. Within five days after mailing the notices required by Paragraph 3 above, the City Clerk shall file his affidavit setting forth said mailing.

Publication of this resolution shall be made by posting a copy thereof on the City Hall Bulletin Board for a period of ten days following the passage hereof.

First reading: October 11, 1950.

Passed and approved this day of October, 1950.

.....

Z. L. Loussac, Mayor.

Attest:

.....

B. W. Boeke, City Clerk.

[Endorsed]: Filed Jan. 4, 1951.

[Title of District Court and Cause.]

AFFIDAVIT OF BETTY KERBY

United States of America,
Territory of Alaska—ss.

Betty Kerby, first being duly sworn, under oath, deposes and says:

1. That I am Acting City Clerk of the City of Anchorage.

2. That on January 8, 1951 I checked the copies of Ordinances 193, 1005 and 1007 and Resolutions 545, 570 and 577, which are on file in Cause No. A-6622 and which are attached to defendant's answer in said cause; that I made this check in the office of the Clerk of the District Court.

3. That I compared the copies so attached to the Answer with the originals of said Ordinances and

Resolutions which are on file in my office or the office of the City Clerk, Anchorage, Alaska;

4. That Ordinances 193, 1005, 1007 and Resolutions 545, 570 and 577 so attached to the Answer are true, full and correct copies of the originals of said Ordinances and resolutions with the following exceptions:

(a) Emergency clause or last four lines of Resolution 545 should be stricken.

(b) As to Resolution No. 570—Date in paragraphs 5-6 thereof should be changed to September 29, 1950 instead of September 27, 1950 and "OK Z.J.L." should be inserted at end of last line of paragraph 6; further, "Second reading—Sept. . . 1950" should read "Second reading—Sept. 13, 1950" and the date "13" should be inserted in the last line thereof.

(c) As to Resolution No. 577, the date "18" should be inserted in the last line thereof.

5. That all of said Ordinances were attested and signed as indicated by the typing beneath signature lines.

6. That I am prepared to make these corrections on the Court's copies of these ordinances attached to defendants' Answer.

7. That attached hereto and expressly incorporated herein is a true, full and correct copy of the map that was attached to the "Petition for Sewers" and "Explanation for Sewer Assessments" referred to and made a part of my affidavit of 4 January 1951; that this is a true, full and correct copy of the map that is a part of the petition for sewers in Improvement District No. 1 which petition is on file in my

office; that I make the statement and attach this copy in order to give the Court a full knowledge of the exact form of the Petition Sewers.

Dated at Anchorage, Alaska, this 9th day of January, 1951..

/s/ BETTY KERBY,

Subscribed and sworn to before me this 9th day of January, 1951.

[Seal] /s/ JOHN S. HELLENTHAL,
Notary Public in and for Alaska.

My Commission expires 10-8-53.

[Endorsed]: Filed Jan. 9, 1951.

[Title of District Court and Cause.]

AFFIDAVIT OF ROBERT E. SHARP

United States of America,
Territory of Alaska—ss.

Robert E. Sharp, first being duly sworn, deposes and says:

1. That I am City Manager of the City of Anchorage and was City Comptroller during the summer months of 1949.

2. That prior to July 1, 1949 the total assessed valuations represented by signatures on petitions for sewer improvements in Sewer Improvement Districts 1, 2, 3 and 4 were made under my supervision; that the valuations are the same as the valuations for said districts contained in Resolution No.

545 with minor exceptions not exceeding about \$14,-000.00.

3. That the petitions with total assessed valuations represented by signatures were presented to the Council prior to June 30, 1949 and were acted upon by the Council and the Council had knowledge of them at the time of the execution of the Stateside Construction Company contract on July 1, 1949.

Dated at Anchorage, Alaska, on 9 January 1951.

/s/ ROBERT E. SHARP.

Subscribed and sworn to before me this 9th day of January, 1951.

[Seal] /s/ JOHN S. HELLENTHAL,
Notary Public for Alaska.

My Commission expires 10-8-53.

[Endorsed]: Filed Jan. 9, 1951.

[Title of District Court and Cause.]

AFFIDAVIT OF PHYLLIS BURKE

United States of America,
Territory of Alaska—ss.

I, Phyllis Burke, first being duly sworn under oath depose and say:

1. That during the months of June and July, 1949 and subsequent thereto, I was employed in the Tax Assessor's Office of the City of Anchorage.

2. That prior to July 1, 1949 I checked the peti-

tions for sewer assessments in Sewer Improvement Districts 1, 2, 3 and 4 and assisted in the insertion of valuations thereon; that the total assessed values represented by signatures on petitions were prepared prior to July 1, 1949 and submitted to the City Engineer; that the total showed that a majority of property owners in value as represented by signatures on petitions had petitioned for improvements in the four districts.

Dated at Anchorage, Alaska, on 9 January 1951.

/s/ PHYLLIS BURKE

Subscribed and sworn to before me this 9th day of January, 1951.

[Seal] /s/ JOHN S. HELLENTHAL,
Notary Public for Alaska.

My Commission expires 10-8-53.

[Endorsed]: Filed Jan. 9, 1951.

[Title of District Court and Cause.]

AFFIDAVIT OF FRANK BAYER

United States of America,
Territory of Alaska—ss.

Frank Bayer, first being duly sworn, under oath, deposes and says:

1. That during the month of June 1949 I personally circulated petitions for sewers in Sewer Improvement Districts 1, 2 and 3.

2. That these petitions were circulated prior to July 1, 1949 and the total valuations represented by signed petitions were calculated prior to said date; that the petitions were presented to the City Engineer for submission to the Council on or about the last week of June, 1949; that at the time of submission more than the required percentages had been obtained in the three districts I was concerned with, namely, 1, 2 and 3. In other words, in all three districts, on July 1, 1949, more than the required number of signatures had been obtained, that is, more than a majority of the property owners in value as represented by signatures on petition.

Dated at Anchorage, Alaska, on 9 January 1951.

/s/ FRANK BAYER,

Subscribed and sworn to before me this 9th day of January, 1951.

[Seal] /s/ JOHN S. HELLENTHAL,

Notary Public in and for Alaska

My Commission expires 10-8-53.

[Endorsed]: Filed Jan. 9, 1951.

[Title of District Court and Cause.]

AFFIDAVIT OF CHARLES TRYCK

United States of America,
Territory of Alaska—ss.

Charles Tryck, first being duly sworn under oath deposes and says:

1. That I was City Engineer of the City of Anchorage during the summer of 1949.

2. That prior to the execution of the contract between the City of Anchorage and Stateside Construction Company for the construction of sewers in what was termed Sewer Improvement Districts 1, 2, 3 and 4, the petitions for sewer improvements were filed with the City and the valuations represented by signatures thereon were computed, and the totals brought before the City Council prior to the execution of said contract; that more than a majority of the property owners in value were represented by signatures on petitions in each of the four areas deemed improvement districts; that people might have signed petitions after the signing of the sewer contract but, if so, they represented an insignificant portion of the total value represented by signatures on petitions and could not in any way affect the total result, as there was clearly a majority on June 30, 1949 and before the contract was executed.

3. That some time between July 1, 1949 and July 25, 1949 the contractor broke ground for the sewer project; that immediately after the execution of the contract, the contractor engaged himself in gathering his equipment.

Dated at Anchorage, Alaska, on 9 January 1951.

/s/ CHARLES N. TRYCK

Subscribed and sworn to before me this 9th day of January, 1951.

[Seal] /s/ JOHN S. HELLENTHAL,

Notary Public in and for Alaska

My Commission expires 10-8-53.

[Endorsed]: Filed Jan. 9, 1951.

[Title of District Court and Cause.]

AFFIDAVIT OF MURRAY INGERSOLL

United States of America,
Territory of Alaska—ss.

Murray Ingersoll, first being duly sworn, under oath, deposes and says:

1. That during the summer of 1949 I was employed by the City Engineer's Office of the City of Anchorage, Anchorage, Alaska.

2. That in June of 1949 I circulated a petition for sewers together with accompanying explanation of sewer assessments and map among the property owners of Sewer Improvement District No. 4 as it was called.

3. That prior to the end of June 1949 I had obtained the signatures of more than a majority in value of the property owners in said area on the petition that I circulated. That some time before the end of the month of June, I delivered the petition to the City Engineer's office where it was checked.

Dated at Anchorage, Alaska, the 9th of January, 1951.

/s/ MURRAY INGERSOLL

Subscribed and sworn to before me this 9th day of January, 1951.

[Seal] /s/ JOHN S. HELLENTHAL,
Notary Public for Alaska.

My Commission expires 10-8-53.

[Endorsed]: Filed Jan. 10, 1951.

[Title of District Court and Cause.]

AFFIDAVIT OF BETTY KERBY RE
COUNCIL MINUTES, JUNE 29-30, 1949

To: John S. Hellenthal, Esq., Attorney for Defendants:

Please take notice that the attached certified copies of the Minutes of the City Council from June 22, 1949, through July 12, 1949, are submitted in opposition to affidavits of Robert E. Sharp, Charles Tryck, Betty Kerby, Frank Bayer, and Phyllis Burke, served on me on the 10th day of January 1951 in further opposition to Plaintiffs' motion for summary judgment.

Dated 10 January 1951.

/s/ GEORGE M. McLAUGHLIN,
Attorney for Plaintiff.

Acknowledgment of Service attached.

Copy

Vol. 7, Page 162

Minutes of a Special Meeting of the City Council
Held on June 22, 1949 at 8:00 p.m.

The meeting was called to order by Mayor Loussac and the following members reported present: Barber, Krause, Rozell, Scavenius, Summers. Absent: Setchfield.

Minutes of the previous meeting were read and approved.

Mr. Wendell Kay, Attorney representing Mr. and

Mrs. John Roberts, requested that the Council reconsider its recent action of denying the subdivision of Lot 6 in Block 38A of the South Addition.

It was moved by Summers and seconded by Rozell to reconsider action taken at the meeting of May 18, 1949 denying the subdivision of Lot 6, Block 38A of the South Addition. All voted in the affirmative.

After considerable discussion it was moved by Summers and seconded by Rozell that the request of Mr. and Mrs. John Roberts to subdivide Lot 6 of Block 38A of the South Addition be granted and that they furnish necessary easements to the City. Voted for the motion: Barber, Krause, Rozell, Summers. Voted against the motion: Scavenius. Motion declared carried.

Mr. M. Lurie and Mr. G. Fields, representing the Pacific Alaska Development Corp., who are contemplating erecting a 682 Apartment unit in the Government Hill and Military Reserve Areas, spoke briefly and requested a written statement to the effect that the proposed structure would meet the Zoning requirements. It was also requested that upon completion of installation of sewers, streets and sidewalks that the City pay its customary share of $33\frac{1}{3}$ per cent of cost of installation, over a five year period, at which time the whole installation would become the property of the City.

The matter was referred to the City Manager and City Attorney to draft the necessary contract and submit at a meeting of the Council the following day.

A letter was read from the Clerk of the U. S. District Court advising that an application had been filed by Axel G. Olson, George A. Kail and R. E. McRoberts d/b/a Scandinavian Club Bar, located at 435 "C" Street, for transfer of License No. 2033 from Axel G. Olson, George A. Kail and Erik Grime-land.

It was moved by Rozell and seconded by Summers that the transfer of Beverage Dispensary Liquor License No. 2033 be approved. All voted in the affirmative.

Mr. Floyd Smith of the Flora Engineering Co. requested that the contract of Kincaid and King be amended to allow for by-monthly payments to the contractor for work performed, instead of one payment each month. The City Manager was authorized to prepare the necessary amendment and submit it at a later meeting.

Mr. Floyd Smith of the Flora Engineering Co., submitted bids for a 200 KVA sub-station and recommended that the bid of the General Electric Co. in the amount of \$29,560.00 be accepted.

It was moved by Scavenius and seconded by Summers that the bid of General Electric Co. be accepted. All voted in the affirmative.

The City Manager read a letter from the Pacific Airmotive Corp. requesting revision of a regulation requiring all buildings at Merrill Field to be moved when no longer needed in connection with flying, to allow leasing or selling its property when the new airport is completed. The matter was tabled until a later meeting.

In a letter, the Anchorage Public Utilities Board requested that an ordinance be passed making it unlawful to fly kites or climb poles near the 34,000 volt transmission lines now in use within the City. The City Attorney was directed to draft an ordinance prohibiting access to poles and sub-stations.

The City Manager read a letter from Mr. Gill requesting payment for trees placed along I Street in 1945. The letter was ordered placed on file.

The following vouchers were presented for payment:

Voucher No.	Vendor	Amount
5-117	City Fuel Company.....	\$ 46.68
5-118	Anchorage Daily News.....	50.00
5-119	Weston Electrical Instrument Corp.....	21.50
6-8	Auditor, Alaska Communication System....	201.30
6-9	Alaskan Stationers & Publishing Co.....	57.40
6-10	Northern Supply	413.69
6-11	City of Anchorage, Payroll Account.....	41105.68
6-12	Federal Credit Union	639.50
6-13	Snyder Office Supply	250.30
6-14	Hohn Plumbing Co.	21.50
6-15	H. R. Huntting Company.....	433.70
6-16	Walt's Transfer	347.88
6-17	Miller and Dalton	43.50
6-18	General Electric Supply Co.....	575.25
6-19	Ken C. Johnson Insurance Agency.....	20.00
6-20	Sunset Motors	5.00
6-21	Burroughs Adding Machine Co.....	2790.10
6-22	Bank of Alaska	3295.75
6-23	Flora Engineering Company	4000.00
6-24	Manley and Mayer	700.00
Check Request No.		
100	Atkins Welding Shop	153.38
101	Miller and Dalton	627.40
102	Northern Excavating Company, Inc.....	52.50
103	City of Anchorage	579.87

It was moved by Rozell and seconded by Scavenius

that the vouchers be approved for payment. All voted in the affirmative.

A proposed Ordinance, Chapter 11 of the Municipal Code, was read for the first time.

Meeting adjourned 1:10 A.M.

/s/ B. W. BOEKE,
City Clerk

Minutes of a Special Meeting of the City Council
Held on June 23, 1949, at 5:15 P.M.

The meeting was called to order by Mayor Loussac and the following Councilmen reported present: Barber, Krause, Rozell, Scavenius, Setchfield. Absent: Summers.

The City Manager read a letter from the Zoning Board advising that it had approved the request of the Pacific Alaska Development Corporation to rezone land described in Resolution No. 530 from Residential No. 1 to Residential No. 2.

Resolution No. 531 in regard to zoning of a portion of Government Hill and Military Reserve Areas from Residential No. 1 to Residential No. 2 area, was read.

[Copy]

City of Anchorage, Alaska

RESOLUTION No. 531

Whereas, the Pacific Alaska Development Corporation has requested the City of Anchorage for permission to erect apartment houses in the Alaska Railroad Terminal Reserve and in a portion of the

southwest portion of the Fort Richardson Military Reserve, both of which tracts of land are within the corporate limits of the City of Anchorage; and

Whereas, the areas in which the proposed apartment houses are to be constructed are within Residential District No. 1 of the Zoning Laws of the City, in which Zoning District apartment house units are prohibited; and

Whereas, the Zoning Commission of the City has recommended that the following amendment to the City Zoning Ordinance be adopted:

Be It Resolved by the City of Anchorage:—

That the Zoning Law or Article 1, Chapter 10, Anchorage General Code, or Ordinance No. 275, be amended to include in Residential District No. 2, the following described properties, situated on Government Hill, all within the corporate limits, and part within the Military Reservation of Fort Richardson and part within the Alaska Railroad Terminal Reserve, as indicated in the following description:—

Ten tracts of land lying within the East Government Hill Subdivision of the Terminal Reserve of the Alaska Railroad at Anchorage, Alaska, as shown on the official maps of the Alaska Railroad, and described as follows, to-wit:

Lots 1 to 10, inclusive, Block 11

Lots 1 to 5, inclusive, Block 16

Lots 6 to 10, inclusive, Block 16

Lots 1 to 5, inclusive, Block 17

Lots 6 to 10, inclusive, Block 17

Lots 1 to 5, inclusive, Block 18

Lots 6 to 10, inclusive, Block 18

Lots 1 to 5, inclusive, Block 19

Lots 6 to 10, inclusive, Block 19

A tract of land adjacent to the southerly side of Hollywood Drive approximately opposite Blocks 16 and 17, and described as follows:

Beginning at a point on the southerly side of Hollywood Drive which lies S. 74 22' E., 150 feet from the northwesterly corner of Block 11. From this point the $\frac{1}{4}$ section corner between Sections 7 and 8, Township 13 North, Range 3 West, Seward Meridian, marked by an iron pipe, bears the following metes and bounds: N. 15 38' E., 395.00 feet thence N. 74 22' W., 1258.46 feet; thence N. 61 39' 30" W., 311.86 feet; thence due East 786.09 feet to the $\frac{1}{4}$ section corner. From the point of beginning, thence S. 74 22' E., 544.32 Feet along the southerly side of Hollywood Drive; thence S. 15 38' W., 140.00 feet; thence N. 74 22' W., 544.32 feet; thence N. 15 38' E., 140.00 feet to the point of beginning.

A tract of ground in Fort Richardson Military Reservation more particularly described as follows:

Point of beginning is center of Section 8 Township 13 North of Range 3 West Seward Meridian; thence due south 930.00 feet; thence North 74 W. a distance of 1600.00 feet; thence North 25 E. a distance of 540.00 feet; thence due East 1320.00 feet to the point of beginning.

This resolution shall be effective on the condition that notice of public hearing in this matter be given in accordance with the ordinances of the City of An-

chorage and Title 16, Chapter 1, Section 35, Paragraph 24th, A.C.L.A. 1949, calling said hearing fifteen (15) days following the passage hereof, and that after said public hearing the City Council readopts this resolution.

Publication of this resolution shall be made by posting a copy thereof on the City Hall bulletin board for a period of ten days following the passage hereof. An emergency is hereby declared and the rules governing the introduction, passage, and approval of resolutions are hereby suspended and this resolution shall be effective on its passage.

Dated this 23 day of June, 1949.

/s/ Z. J. LOUSSAC,
Mayor.

Attest:

/s/ B. W. BOEKE,
City Clerk."

[Copy]

It was moved by Rozell and seconded by Scavenius that the rules be suspended to consider the resolution. All voted in the affirmative.

It was moved by Scavenius and seconded by Rozell that Resolution No. 531 be adopted. All voted in the affirmative.

Resolution No. 530, an agreement with the Pacific Alaska Development Co. to arrange for the installation of sewer, water, streets and sidewalks, was read.

[Copy]

City of Anchorage, Alaska

RESOLUTION No. 530

Agreement With Pacific Alaska Development
Corporation

The Pacific Alaska Development Corporation, a foreign corporation, hereinafter called the "corporation", having requested the City Council that arrangements be made for the installation of a sewer system, water system and streets and sidewalks in connection with their "Panoramic Vista and Panoramic View Apartment Project", and having indicated that said utility installations will be made by their corporation with the understanding that the City pay one-third of the cost of the installation of said utilities over a five-year period, and both parties having agreed that a resolution should be prepared by the City Council in the nature of a working agreement in connection with said matters;

Now, Therefore, be it resolved by the City of Anchorage, Alaska;

1. The corporation has leased from the United States Department of the Interior, the Alaska Railroad, for a term of seventy-five (75) years beginning May 16, 1949, the following described properties located within the corporate limits of the City of Anchorage, Alaska, within the Terminal Reserve of the Alaska Railroad, within the East Government Hill Subdivision thereof, which properties are within the jurisdiction of the City of Anchorage, Alaska, and described as follows:

Ten tracts of land lying within the East Government Hill Subdivision of the Terminal Reserve of the Alaska Railroad at Anchorage, Alaska, as shown on the official maps of the Alaska Railroad, and described as follows, to wit:

Lots 1 to 10, inclusive, Block 11

Lots 1 to 5, inclusive, Block 16

Lots 6 to 10, inclusive, Block 16

Lots 1 to 5, inclusive, Block 17

Lots 6 to 10, inclusive, Block 17

Lots 1 to 5, inclusive, Block 18

Lots 6 to 10, inclusive, Block 18

Lots 1 to 5, inclusive, Block 19

Lots 6 to 10, inclusive, Block 19

A tract of land adjacent to the southerly side of the Hollywood Drive approximately opposite Blocks 16 and 17, and described as follows:

Beginning at a point on the southerly side of Hollywood Drive which lies S. 74 22' E., 150 feet from the northwesterly corner of Block 11. From this point the $\frac{1}{4}$ section corner between Sections 7 and 8, Township 13 North, Range 3 West, Seward Meridian, marked by an iron pipe, bears the following metes and bounds: N. 15 38 E., 359.00 feet thence N. 74 22' W., 1258.46 feet; thence N. 61 39' 30" W., 311.86 feet; thence due East 786.09 feet to the $\frac{1}{4}$ section corner. From the point of beginning, thence S. 74 22' E., 544.32 feet along the southerly side of Hollywood Drive; thence S. 15 38' W., 140.00 feet; thence N. 74 22' W., 544.32 feet; thence N. 15 38' E., 140.00 feet to the point of beginning.

2. The corporation has obtained a lease from the Secretary of the Army for the construction of an apartment house project of the following described land located within the corporate limits of the City of Anchorage and situated in the Fort Richardson Military Reservation:

A tract of ground in Fort Richardson Military Reservation more particularly described as follows:

Point of beginning is center of Section 8 Township 13 North of Range 3 West Seward Meridian; thence due south 930.00 feet thence North 74 W. a distance of 1600.00 feet; thence North 25 E. a distance of 540.00 feet; thence due East 1320.00 feet to point of beginning.

3. The corporation contemplates the construction of 264 units on the lands described in Paragraph 1 above and the construction of 418 units on the land described in Paragraph 2 above.

4. The fee title to the lands described in Paragraph 1 above lies with the United States Government and the question of title to the lands described in Paragraph 2 is undetermined, but in all events as between the parties hereto, their successors and assigns, the properties described in Paragraphs 1 and 2 above are to be considered as if within the corporate limits of the City of Anchorage in computing taxes, where collectible, or payments in lieu thereof, if not assessable, and fully entitled to the benefits afforded all property within the corporate limits.

5. The corporation agrees to construct and install in the above-described tracts of lands, utilities, the size of said utility installations to be commensurate

with the number of units proposed to be constructed. The corporation agrees to bear the initial cost of said installation and to keep accurate records of the cost thereof, which records shall be available to the City at all times for inspection at reasonable hours. The term "utility" shall be deemed to include sewers (storm and sanitary, trunk and lateral), but not service connections and extensions; water mains (laterals and trunks) but not service connections and extensions; and streets, sidewalks and storm drains.

6. The City agrees following and beginning with the completion of construction of fifty per cent (50%) of the buildings served by the contemplated utilities and the completion of said utilities to pay to the corporation one-third ($\frac{1}{3}$) of the actual cost of said utility installations in five (5) equal annual payments, without interest. The total city payment shall be one-third ($\frac{1}{3}$) of the actual cost as herein defined, but in no event shall said total payment exceed the sum of \$100,000.00. It is agreed that it is the intention of the parties that said figure is based upon one-third ($\frac{1}{3}$) of the total estimated cost of construction and installation of utilities sufficient to serve the entire project and not just a portion thereof. "Completion of buildings" shall be understood to mean that stage of construction when occupancy of the buildings is reasonably possible. "Actual cost" shall include cost of materials and labor and interest payments on money borrowed for said purpose from government agencies.

7. Title to all utilities shall pass to the City upon

installation thereof and shall remain in the City at all future times.

8. The City agrees to furnish to the corporation and to the properties described in Paragraph 1 and 2 above, fire protection, police protection, health and sanitary protection and all benefits afforded by the City to its citizens, to the extent that such benefits are afforded to other sections of the City and on a non-discriminatory basis.

9. The corporation agrees to pay all taxes and assessments that may be from time to time assessed and levied against the improvements placed upon the properties described above and upon the properties themselves to the extent that they are taxable and assessable at rates imposed throughout the City. This proviso contemplates such taxes and assessments as the corporation shall be legally bound to pay and further contemplates a full payment in lieu of taxes (equal to what could be assessed on leasehold improvements if within the City except for land values of leaseholds) based upon the assumption that all the above-described properties are within the corporate limits, in case it develops that they are not. The City agrees to be responsible for the maintenance and repair of the utilities herein contemplated at all future times. If the City Council determines to assess for the cost of repair of utilities similar to the utilities herein described throughout the City, the corporation agrees to pay said assessment.

10. The corporation agrees to submit all plans and specifications and estimates of cost of construction for utilities herein contemplated to the City of

Anchorage for its approval prior to installation and the corporation agrees to install said utilities in a manner in conformity to the ordinances, rules and regulations and standards of the City. It is estimated that the cost of utilities herein contemplated is \$292,000.00. The City must approve all said plans and specifications prior to installation of the proposed utilities. The corporation agrees to abide by all requirements of the Territorial Department of Health with regard to said utility installation and construction.

11. In installing the utilities, the corporation agrees to secure competitive bids for their installation, in whole or in part, and not to depart from this system of bidding without the City's consent.

12. The corporation agrees to obtain easements from the Alaska Railroad, or the U. S. Department of the Army, or any other interested person for installation of utilities, for a period equal to the duration of the corporation's lease; said easements to be submitted with plans and specifications to the City for approval.

13. This agreement is in the nature of a working agreement and may be modified by mutual consent from time to time but in cases of disagreement the Alaska Railroad is hereby nominated by both parties as arbitrator.

14. This agreement shall be executed by the City this 23rd day of June, 1949 and executed by the legally authorized officials of the Pacific Alaska Development Corporation within ten (10) days thereafter, and property acknowledged by said officials,

and shall be prepared and executed in quintuplicate. This agreement shall bind the successors and assigns of the parties hereto.

Dated at Anchorage, Alaska, this 23rd day of June 1949.

CITY OF ANCHORAGE,

By /s/ Z. J. LOUSSAC, Mayor.

PACIFIC ALASKA DEVELOPMENT CORPORATION,

By /s/ HARVEY LUCIER, President.

Attest:

/s/ MELVIN D. LURIE, Secretary.

Publication of this resolution shall be made by posting a copy thereof on the City Hall bulletin board for a period of ten days following the passage hereof.

An emergency is hereby declared and the rules governing the introduction, passage and approval of resolutions are hereby suspended and this resolution shall be effective on its passage by the Council and approval by the Mayor this 23rd day of June, 1949.

/s/ Z. J. LOUSSAC, Mayor.

Attest:

/s/ B. W. BOEKE, City Clerk.

It was moved by Setchfield and seconded by Rozell that the rules be suspended to consider the resolution. All voted in the affirmative.

It was moved by Setchfield and seconded by Scaenius that Resolution No. 530 be adopted. All voted in the affirmative.

Meeting adjourned 6:10 p.m.

/s/ B. W. BOEKE, City Clerk.

Minutes of a Special Meeting of the City Council

Held on June 27, 1949 at 5:15 p.m.

The meeting was called to order by Mayor Loussac and the following members reported present: Barber, Krause, Rozell, Scavenius, Setchfield. Absent: Summers.

Awarding of the bids for the construction of the water gravity system was discussed. No action taken and meeting called for 11 a.m. the following day.

Meeting adjourned 6:10 p.m.

/s/ B. W. BOEKE, City Clerk.

Minutes of the Special Meeting of the City Council

Held June 28, 1949 at 11:00 a.m.

Meeting called to order by Councilman Barber and the following reported present: Barber, Krause, Rozell, Scavenius, and Setchfield. Absent: Mayor Loussac and Councilman Summers.

It was moved by Rozell and seconded by Setchfield that Councilman Barber be appointed acting mayor to preside over the meeting. Voted yes: Barber, Rozell, Scavenius, and Setchfield. Voted no: Krause.

Awarding of the bids for construction of the Gravity Water System was discussed.

It was moved by Setchfield, seconded by Scavenius that all bids received for the construction of the Gravity Water System be rejected and Flora Engineering Company instructed to immediately call for new bids. Voted yes: Barber, Rozell, Scavenius and Setchfield. Voted no: Krause.

Meeting adjourned 11:25 a.m.

/s/ B. W. BOEKE, City Clerk.

Minutes of a Special Meeting of the City Council
Held on June 29, 1949 at 8:00 p.m.

Mayor Loussac absent, the meeting was called to order by Councilman Barber and the following reported present: Barber, Krause, Rozell, Scavenius, Setchfield, Summers.

It was moved by Setchfield and seconded by Rozell that Councilman Barber be appointed Acting Mayor to preside over meetings during Mayor Loussac's absence. All voted in the affirmative.

Minutes of the previous meetings were read and approved.

A letter was read from the Clerk of the U. S. District Court that an application had been filed by Nathan Pendleton Post No. 9890, Veterans of Foreign Wars, located at 113 East 5th Avenue for a Club Liquor License to expire December 31, 1949. The application was approved by the Police, Fire and Health Departments.

It was moved by Scavenius and seconded by Rozell that the application of the Nathan Pendleton Post No. 9890, Veterans of Foreign Wars, for a Club liquor License be approved. All voted in the affirmative.

Only one bid on the construction of the expansion of the sewer system having been submitted, that of the Stateside Construction Company in the amount of \$488,201.05, which was above the engineer's estimate, Mr. Smith recommended that he be authorized to negotiate further with the contractor.

The City Engineer and Flora Engineering Com-

pany were authorized to further negotiate with the Stateside Construction Company and report at a Council meeting to be held at 7 p.m. the following day.

The City Comptroller submitted the budget report for the period January 1 to May 31, 1949 and was commended by all members of the Council.

The City Manager stated that the clerical and typing duties of the City Magistrate had been taken over by a newly appointed court clerk.

It was moved by Rozell and seconded by Scavenius that the \$50.00 per month allowance for clerical and typing duties paid the City Magistrate be discontinued since the function has been assumed by the Court Clerk. All voted in the affirmative.

The City Engineer submitted a detailed report outlining the estimated assessments to be levied for paving sidewalks, curbs and gutters now under construction.

The City Manager recommended that he be authorized to advertise for bids for the demolishment of the Ark, located just west of the Central Building, which has been condemned by the Building Inspector.

It was moved by Summers and seconded by Setchfield that the City Manager be authorized to advertise for bids for the demolishment of the building. All voted in the affirmative.

The City Manager submitted a map upon which was indicated the streets upon which additional parking meters could be installed.

The City Manager read a letter from Hoyt Motor Co. requesting that the City accept ownership of the Garbage truck damaged in shipping, at a reduced price, after repairs to the chassis are made.

It was decided not to accept the offer made by the Hoyt Motor Company for repair of the damaged truck.

The City Manager recommended that the position of Police Lieutenant be abolished from the police roster.

It was moved by Scavenius and seconded by Setchfield that the City Manager be authorized to eliminate the position of Police Lieutenant. Voted for the motion: Barber, Krause, Scavenius, Setchfield. Voted against the motion: Rozell, Summers. Motion declared carried.

The City Manager read a letter from the Pacific Coast Building Officials Association announcing a building officials conference in Seattle, Sept. 20 to 23. It was recommended by the City Manager that Mr. Chitty, the Building Inspector, attend the conference.

It was moved by Scavenius and seconded by Rozell that the City Manager be authorized to arrange for the Building Inspector to attend the conference and for the procurement of air travel, and that the Building Inspector submit, later, an itemized expense account for hotel, meals and other normal routine travel expenses. All voted in the affirmative.

The City Manager read a letter from the Chugach Electric Association requesting they be allowed to

purchase the existing outside City electric distribution system.

After considerable discussion it was moved by Scavenius and seconded by Summers that the City Manager be directed to expand the electric distribution and telephone plant outside the City limits. All voted in the affirmative.

The following vouchers were presented for payment:

Voucher No.	Vendor	Amount
6-25	Stanley H. Reese.....	\$ 35.34
6-26	The Bond Buyer.....	50.00
6-27	Parcel Delivery & Transfer.....	81.00
6-28	Anchorage Daily News.....	15.00
6-29	Hewitt's	21.80
6-30	The Alaska Railroad	448.26
6-31	City of Anchorage—Payroll Account.....	1500.00
6-32	East Side Service Station.....	3.10
6-33	Commercial Stationers	75.94
6-34	Kennedy Hardware Co.	1097.60
6-35	The Alaska Railroad	7955.30
6-36	Bliss Construction Co.	129.87
6-37	Alaska Sales and Service	3500.00
6-38	Edward D. Coffey Ins. Co.....	108.55
6-39	J. C. Morris Agency.....	1729.43
6-40	Hoyt Motor Co.	2532.00
6-41	Edward D. Coffey Ins. Co.....	7.80
6-42	J. C. Morris Agency.....	90.13
6-43	Hoyt Motor Co.	5051.04

Check Requests

104	Federal Pipe & Tank Co.....	70660.27
105	Parcel Delivery & Transfer.....	33.75
106	Federal Pipe and Tank Co.....	53109.81
107	Northern Excavating Co., Inc.....	26.25
108	City of Seward	120.00
109	C. William Hufeisen, Builder	4656.69
110	Roy Boedeke	1300.00

It was moved by Rozell and seconded by Scavenius

that the above vouchers be approved for payment. All voted in the affirmative.

Meeting adjourned at 11:00 p.m.

/s/ B. W. BOEKE,
City Clerk.

Minutes of a Special Meeting of the City Council
Held on June 30, 1949 at 7:00 p.m.

The meeting was called to order by Acting Mayor Barber and the following councilmen reported present: Barber, Krause, Rozell, Scavenius, Setchfield. Absent: Mayor Loussac and Councilman Summers.

A letter was read from the Clerk of the U. S. District Court advising that an application had been filed by John F. Campbell, H. B. Miller, Betty B. Snook and Marg Osburn d/b/a Coral Bar at 211 4th Ave. for a Beverage Dispensary Liquor license to expire December 31, 1949. The application was approved by the Fire and Police Departments. The Health department withheld approval until installations are completed.

It was moved by Scavenius and seconded by Setchfield that the application of John F. Campbell, H. B. Miller, Betty B. Snook and Marg Osburn d/b/a the Coral Bar at 211 4th Ave. be approved subject to the approval of the Health Department. All voted in the affirmative.

Mr. Floyd Smith, representative of the Flora Engineering Company, recommended that the bid of Stateside Construction Company for the installation of the sewer system be reduced to \$400,000.00 and accepted.

It was moved by Scavenius and seconded by Setchfield that the Stateside Construction Company bid be accepted with the provision of a letter of limitation that the contract amount is not to exceed \$400,000.00. All voted in the affirmative.

Meeting adjourned 7:55 p.m.

/s/ B. W. BOEKE,
City Clerk.

Minutes of the Regular Meeting of the City Council
Held on July 6, 1949 at 8:00 p.m.

The meeting was called to order by acting Mayor Barber and the following councilmen reported present: Barber, Krause, Rozell, Scavenius, Setchfield. Absent: Mayor Loussac and Councilman Summers.

Minutes of the previous meeting were read and approved.

Summers present.

The City Manager read a letter from the Pacific Airmotive Corporation recommending that a policy be established which would permit new leasees to establish themselves on City Property at Merrill Field even though they are not engaged in the Aviation business. A letter was also read from Mr. Roy Heaton, Airport Manager, recommending that a policy be established relative to leasing buildings at Merrill Field for non Aviation purposes.

It was moved by Rozell that the matter be tabled until a later meeting. Motion failed for lack of a second.

It was moved by Setchfield and seconded by Rozell that the City Manager be authorized to negotiate any

lease for the City owned or leased lands at Merrill Field if the premises are used for purposes directly connected with the Aviation Industry and subject to Council approval. Voted for the motion: Barber, Krause, Rozell, Setchfield, Summers. No vote: Scavenius. Motion declared carried.

Mr. Ray Morgan of the Flora Engineering Co. spoke briefly and gave a report on the progress of the paving program and requested that a policy be established for the assessment of costs of paving the driveways between the curb and sidewalk in the residential areas. It was decided that each property owner would be responsible for driveways extending from the curb through the parkway to the sidewalk, and given an opportunity to make the installation at this time.

The City Manager read a copy of a letter from the Chugach Electric Association to the Anchorage Public Utilities for a request of 600 K.W. primary power to energize their distribution system. The matter was referred to the City Manager.

The City Manager read a letter from the Anchorage Baseball League pertaining to the concessioners of the ball park. The matter was referred to the City Manager.

The following vouchers were presented for payment:

Voucher No.	Vendor	Amount
6-44	Petty Cash Fund	\$ 258.69
6-45	Anchorage Installation Co.	24.90
6-46	J. K. Gill Company	26.92

Voucher No.	Vendor	Amount
6-47	Council-Mayor Salaries	400.00
6-48	Hellenthal, Hellenthal & Cottis	500.00
6-49	Sheahan-Nock Agency	253.59
6-50	Sheahan-Nock Agency	1185.00
6-51	City of Anchorage	2000.00
6-52	Yukon Merchandising	30.00
6-53	The Alaska Railroad	6.00
6-54	Home Reconditioning Service	9.75
6-55	Alaska Communication System	54.25
6-56	City Fuel Co.	28.35
6-57	General Electric Supply Co.....	608.07
6-58	Campbell Hardware & Supply	289.95
6-59	Line Material Company	1171.28
6-60	City of Anchorage, Payroll	41105.08
6-61	Federal Credit Union	723.05
6-62	First National Bank—Fed. Withholding..	11256.66
6-63	Territory of Alaska	65.00
6-64	Jacobs Rubber Stamp Co.	17.45
6-65	International City Manager's Assoc.....	4.50
6-66	Wiggins Construction Co.	19.80
6-67	Alaska Seed and Nursery Co.	107.00
6-68	Burroughs Adding Machine Co.	46.48
7-1	City of Anchorage	50.00
Check Requests		
111	Alaska Paint & Glass	357.00
112	Poles, Inc.	1160.00
113	Burroughs Adding Machine	248.40
114	Brady's Floor Covering	35.50
115	Bill Connolly	100.00
116	Burroughs Adding Machine	43.20
117	John Odom	135.00

It was moved by Rozell and seconded by Setchfield that the above vouchers be approved for payment. All voted in the affirmative.

Meeting adjourned 12:10 p.m.

/s/ B. W. BOEKE,
City Clerk.

Minutes of a Special Meeting of the City Council
Held on July 12, 1949 at 8:00 p.m.

The meeting was called to order by Acting Mayor Barber and the following councilmen reported present: Barber, Krause, Rozell, Setchfield, Summers. Absent: Mayor Loussac and Councilman Scavenius.

A discussion was held, with the members of the Anchorage Public Utility Board in attendance, in regard to a recent letter submitted by the CEA requesting 600 K.W. primary power to energize their distribution system.

It was moved by Rozell and seconded by Krause that the A.P.U. be authorized to negotiate a contract with C.E.A. as to rate, method and other pertinent terms for furnishing interm power, said contract to be submitted to the City Council for approval. Also voted in the affirmative.

It was moved by Setchfield and seconded by Rozell that the A.P.U. be authorized to enter into a fuel oil contract for the coming year. All voted in the affirmative.

Meeting adjourned at 11:30 p.m.

/s/ B. W. BOEKE,
City Clerk.

Certification

I, Betty Kerby, custodian of the records and keeper of the Minutes of the Common Council of Anchorage, Alaska, in the absence of the City Clerk do hereby certify that the above is a true and correct copy of the Minutes of the City Council from

June 22, 1949 through July 12, 1949 as recorded on pages 162 through 174, Volume 7 of the Minute Book of the City of Anchorage. Typographical errors having been corrected and initialed by me this 10th day of January 1951.

[Seal] /s/ BETTY KERBY,
 Acting City Clerk.

[Endorsed]: Filed January 10, 1951.

[Title of District Court and Cause.]

AFFIDAVIT OF BETTY KERBY RE
COUNCIL MINUTES

United States of America,
Territory of Alaska—ss.

I, Betty Kerby, first being duly sworn, under oath, depose and say:

1. That the following extracts are true, full and correct copies of the minutes of council meetings held on June 29, 1949 and June 30, 1949:

“Minutes of a Special Meeting of the City Council held on June 29, 1949, at 8:00 p.m.

“Mayor Loussac absent, the meeting was called to order by Councilman Barber and the following reported present: Barber, Krause, Rozell, Scavenius, Setchfield, Summers.

“It was moved by Setchfield and seconded by Rozell that Councilman Barber be appointed Acting Mayor to preside over meetings during Mayor Loussac’s absence. All voted in the affirmative.

* * * * *

“Only one bid on the construction of the expansion of the sewer system having been submitted, that of the Stateside Construction Company in the amount of \$488,201.05, which was above the engineer’s estimate, Mr. Smith recommended that he be authorized to negotiate further with the contractor.

“The City Engineer and Flora Engineering Company were authorized to further negotiate with the Stateside Construction Company and report at a Council meeting to be held at 7 p.m. the following day.”

“Minutes of a Special Meeting of the City Council held on June 30, 1949 at 7:00 p.m.

“The meeting was called to order by Acting Mayor Barber and the following councilmen reported present: Barber, Krause, Rozell, Scavenius, Setchfield. Absent: Mayor Loussac and Councilman Summers.

* * * * *

“Mr. Floyd Smith, representative of the Flora Engineering Company, recommended that the bid of Stateside Construction Company for the installation of the sewer system be reduced to \$400,000.00 and accepted.

“It was moved by Scavenius and seconded by Setchfield that the Stateside Construction Company bid be accepted with the provision of a letter of limitation that the contract amount is not to exceed \$400,000.00. All voted in the affirmative.”

2. That I am the Acting City Clerk of the City

of Anchorage and the custodian of the minute book which contains the record of the council proceedings.

Dated at Anchorage, Alaska, on 10 January 1951.

/s/ BETTY KERBY

Subscribed and sworn to before me this 10th day of January, 1951.

[Seal] /s/ JOHN S. HELLENTHAL,
Notary Public in and for Alaska
My Commission expires 8 October 1953.

Acknowledgment of Service attached.

[Endorsed]: Filed January 10, 1951.

[Title of District Court and Cause.]

OPINION

George M. McLaughlin, Attorney for Plaintiffs,
Anchorage, Alaska.

Hellenthal, Hellenthal & Cottis, Attorneys for Defendants, Anchorage, Alaska.

This suit was brought by the plaintiffs to enjoin the City of Anchorage and its Mayor and other officials from enforcing the collection of a special assessment for the construction of a sewer made upon a City lot owned by the plaintiffs. It is now before the Court upon plaintiffs' motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, and defendants' like motion for summary judgment made at the conclusion of the argument.

The controlling statutory provisions are to be found in Sections 16-1-81, 16-1-82, and 16-1-83, Alaska Compiled Laws Annotated 1949, hereinafter referred to as ACLA, which read as follows:

“16-1-81. Improvements for which assessment authorized: Property benefited: Amount of assessment: Owners’ request for improvement. The council may assess against the real property specially benefited by such improvements two thirds of the cost of laying out, grading, constructing or repairing any street, alley or sidewalk, constructing or repairing any sewer or drain, acquiring and constructing parks or playgrounds or making changes in channels of streams or water courses or constructing, erecting, strengthening or repairing, bulkheads, embankments or dikes for such streams or water courses. Such costs shall be assessed against the real property specially benefited in proportion to the benefits so received by each tract of land. Provided, however, that no such assessment shall be levied for any improvement unless such improvement be in writing requested of the city council by the owners of at least one half in value of the property to be so specially benefited by such improvement. The expense so assessed may include the cost to the city of acquiring premises for such improvements.”

“16-1-82. Council to determine necessity of improvements and sufficiency of petition: Findings: Forgery. When such request is presented to the council the same shall be filed and the council shall determine (1) whether the improvement requested is necessary and should be made, (2) whether the re-

quest is signed by all the owners of at least one half in value of the property specially benefited by such improvement and shall pass a resolution containing the council's findings on such questions, which findings shall be conclusive save and except that anyone who signs the name of another to such request without written power of attorney so to do, or who shall procure, solicit, aid or abet or induce another to do so, shall be guilty of forgery and shall be punished accordingly."

"16-1-83. Decision of council as to improvement and assessment. If the council find that the improvement is necessary and that the request has been signed by the owners of at least one half in value of the property to be specially benefited, the council may also decide that any part of the cost of such improvement, not, however, to exceed two-thirds thereof, shall be (the) assessed against the real property so benefited in proportion to the amount of such benefits received, by each tract of property."

The undisputed record shows that on April 29, 1949, the Council enacted Ordinance No. 1007, which, among other things, obliged the City to levy the assessment to repay bonds to be issued for construction of the sewer. On July 1, of the same year, the contract for the construction of the sewer was let. In the meantime, after April 1, 1949, and prior to July 1, 1949, petitions were circulated and signatures obtained of a majority in number of the property owners asking for the construction of the sewer and consenting to the levy of the assessments now challenged. That petition was not signed by the plaintiffs

in this action. However, it seems certain that the petitions were before the Council on July 1, 1949, when the work was authorized. Nothing in the minutes of the Council indicates that any action was taken on the petitions or with respect to them at that time.

It was not until March 2, 1950, that the resolution was passed in conformity with the requirements of Section 16-1-82, finding the petition sufficient and the improvements necessary. In the meantime, as shown by Section 201.1 of the Anchorage General Code, of which the Court must take judicial notice, Section 55-5-12, ACLA, an election was scheduled to be held on October 4, 1949, for the election of two members of the Council. Accordingly, it appears that the Council which passed the resolution of March 2, 1950, was not the identical council which authorized the work even though, through re-election, the membership may have been the same.

Plaintiffs urge that the detailed requirements of Section 16-1-82 are mandatory and that those steps must be taken in order before the levy can be made and the work carried out, and that failure in such respect makes the assessment void. Defendants assert that the provisions of the Section are not mandatory, but directory only, and hence not essential to the validity of the assessment and levy.

ACLA is a compilation only and not positive law, and, therefore, it is necessary to go to the source of the statute. The three sections above quoted are part of Chapter 97 of the Session Laws of Alaska, 1923,

Section 16-1-82 appearing as Section 64 of Chapter 97. Reference to the Session Laws shows that as enacted, Section 64 contained the following heading: "Council must determine the necessity of improvement and sufficiency of petition." (Emphasis supplied.) No suggestion is made that the title of the Section was ever changed by legislative enactment, but in the compilation now to be found in ACLA, the word "must", as embraced in Chapter 64, has been editorialized to the word "to" in Section 16-1-82. Note is made of the change so brought about without legislative action because it may throw some light upon the purpose and intent of the legislature. In the body of the Section, we find that the Council "shall" take the steps prescribed therein as preliminary to the making of the assessment. While the word "shall" may be construed as permissive rather than mandatory, there is nothing in the statute under consideration to require it. Attention has been invited to the text of 6 McQuillin on Municipal Corporations (3rd Ed.) 141, and to 50 Am. Jur 53, in support of the suggestion that "shall" ought to be construed as "may". However, the limitations of the doctrine are accurately pointed out in 50 Am. Jur. 54, as follows:

"The rule applies where no advantage is lost, when no right is destroyed, when no benefit is sacrificed, either to the public or the individual, by giving it such construction. * * * The courts are, however, reluctant to contravene or construe away terms of a

statute which in themselves are mandatory, except where the intent and purpose of the legislature are plain and unambiguous and clearly signify a contrary construction.”

The defendants further suggest that only substantial compliance with the statute is indispensable, 14 McQuillin on Municipal Corporations (3rd Ed.) 264, 48 Am. Jur. 683, and that the order in which several steps are taken is of no material consequence, *City of Lowell vs. Lowell Building Corporation*, 34 N.E. (2d) 618 (Mass. 1941), in which it is held that an order of the council made after the work was completed “may properly be held to have been a ratification of the work previously done and a subsequent ratification is the equivalent or original authority.” But nowhere in the opinion of the Lowell case are to be found the applicable statutes or the ordinances upon which the decision is based.

No matter how persuasive and even convincing may be the reasoning advanced by the defendants here, and underlying the decision in the Lowell case, plainly designed to uphold the public interest without injustice to any individual, this Court in this action is controlled by the opinion and decision of the Circuit Court of Appeals for the Ninth Circuit, given in the year 1923, in the case of *In re Ketchikan Delinquent Tax Roll*, 293 F. 577, from which the following is quoted:

“Section 627 of the Cimpiled Laws of the Territory of Alaska of 1913 provides as follows:

“ ‘That the said common council shall have and exercise the following powers: * * * Fourth. To provide for the location, construction, and maintenance of the necessary streets, alleys, crossings, sidewalks, sewers, and wharves. If such street, alley, sidewalk, or sewer, or parts thereof, is located and constructed upon the petition of the owners of two-thirds in value of the property abutting upon and affected by such improvement, then two-thirds of the cost of the same may, in the discretion of the council, be collected by the assessment and levy of a tax against the abutting property, and such tax shall be a lien upon the same and may be collected as other real estate taxes are collected.’

“Section 628 provides:

“ ‘The common council may exercise their powers by ordinance or resolution, but no ordinance or resolution shall be valid unless adopted by a vote of four members of the council, at a meeting where not less than five members are present.’

“On the 5th day of October, 1920, a petition was presented to the common council of the city of Ketchikan, praying for the construction of a certain roadway and sidewalk and the establishment of a right of way therefor; the petitioners agreeing to pay their proportionate share of two-thirds of the cost of the improvement, and that the same be a specific lien upon their respective properties abutting on the improvement. The petition was approved and ordered filed upon presentation to the city council, and the city clerk was directed to call for bids for the work

at the next regular meeting. So far as the record discloses, no other or further action was taken by the city council until a resolution was adopted on February 2, 1921, assessing two-thirds of the cost of the improvement against certain persons and the lands owned or occupied by them, and declaring the sums so assessed a specific lien upon the lands. On May 20, 1922, the delinquent tax roll for the city for the year 1921 was presented to the court under the provisions of chapter 69 of the Session Laws of Alaska of 1913, for adjustment and order of sale of the property therein described. At the same time there was presented the delinquent assessment roll for the improvement in question. The appellee, Furnivall, filed objections to the assessment and order of sale and after hearing before the court the objections were sustained. From that order the present appeal is prosecuted.

“In the course of its opinion the court below said:

“ ‘It being shown clearly that two-thirds of property owners abutting on the proposed Harris Street extension had not petitioned therefor, this is jurisdictional, and, as to the nonconsenting owners, the whole proceedings are illegal.’

“1. But the court made no further findings upon that issue. The court further held, however, that inasmuch as the improvement and assessment against the **abutting** property was not provided for by ordinance or resolution, the whole proceeding was void, and upon this latter ground we are of opinion that

the judgment of the court below should be affirmed. The power to locate, construct, and maintain streets, and more especially the power to impose a tax upon abutting property owners, is a legislative one, and can only be exercised by ordinance or resolution. 28 Cyc. 992; *Chicago & N.P.R. Co. vs. City of Chicago*, 174 Ill. 439, 51 N.E. 596; *Eckert vs. Walnut*, 117 Iowa, 106, 91 N.W. 929; *Zalesky vs. Cedar Rapids*, 118 Iowa, 714, 92 N.W. 657; *McQuillin's Municipal Corporations*, p. 1334.

“2. Furthermore, under the Alaska statute, the discretion to levy a tax upon abutting property to pay two-thirds of the cost of an improvement must be exercised when the petition for the improvement is heard, and before, or at the time, the improvement is ordered. Most assuredly one city council cannot make an improvement, and some other city council, at some later day, exercise the discretion to impose a part of the burden upon abutting property owners.

“The assessment is therefore void, and the judgment is affirmed.”

The force of the opinion above quoted is not materially weakened by the fact that the assessment there made was under a statute which has since been repealed. This Court is nevertheless bound by the ruling that the steps must be followed in the order provided in the statute without substantial deviation, and that one council is not permitted by ratification to validate in such a matter the acts of a previous council.

The question of estoppel also is here presented. The plaintiffs made no protest concerning the con-

struction and appeared at the hearing urging only that the cost of the work be paid out of the general funds of the City and not paid in part by special assessments. The elements of equitable estoppel are well stated in the case of *Schmidt et al vs. Village of Deer Park*, 78 N.E. (2d) 72 (Ohio 1947), cited and quoted in defendants' brief, as follows:

"Active participation in causing the improvements to be made will estop the party engaged therein from denying the validity of the assessment; but to create an estoppel from silence merely, it must be shown that the owner had knowledge:

"1. That the improvement was being made.

"2. That it was intended to assess the cost thereof, or some part of it, upon his property.

"3. That the infirmity or defect in the proceedings existed which he is to be estopped from asserting; and

"4. It must appear that some special benefit accrued to his property from such improvement which it is inequitable, under the circumstances, he should enjoy without compensation."

Substantially the same rules were set forth in *In re Ketchikan Delinquent Tax Roll*, 6 Alaska 653 (1922) affirmed 293 Fed. 577.

There is no proof that at the time the work was done the plaintiffs had knowledge that it was intended to assess the cost of the improvements or some part of it upon their property, and therefore I find that estoppel does not operate against the plaintiffs in this case.

Counsel for defendants assert that a decision in favor of the City would not run counter to the due process provisions of the Constitution because under Sec. 16-1-85 ACLA, the plaintiffs were heard to present their objections to the assessment. But if the provisions of Section 16-1-82 are mandatory, full compliance with due process otherwise is not sufficient, under the decision of the Court of Appeals in the Ketchikan case, to validate the assessment.

There is question whether in a case of such consequence, a summary judgment is proper. 8 *Cyclopedia Fed. Procedure* 215; *Kennedy vs. Silas Mason Co.*, 334 U.S. 249 (1947); *Eccles vs. Peoples' Bank*, 333 U.S. 426 (1947); but since it appears that all of the facts are fully stated in the record, and no further facts could be gained by trial, and since both parties ask for summary judgment, it is appropriate that the case be decided on the motions.

Following the authority of the Ketchikan case, the motion for summary judgment in favor of the plaintiffs and against the defendants is granted.

Dated at Anchorage, Alaska, this 29th day of January, 1951.

/s/ ANTHONY J. DIMOND,
District Judge.

[Endorsed]: Filed January 29, 1951.

In the District Court for the Territory of Alaska,
Third Division

No. A-6622

ARTHUR E. ASHLEY and VIRGINIA
ASHLEY,

Plaintiffs,

vs.

THE CITY OF ANCHORAGE, a municipal corporation; Z. J. LOUSSAC, Mayor of the City of Anchorage; B. W. BOEKE, City Clerk-Treasurer of the City of Anchorage; ROBERT E. SHARP, City Manager of the City of Anchorage,

Defendants.

JUDGMENT

The above entitled cause came on regularly to be heard before the court on the 5th day of January, 1951, on the Plaintiffs' motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, and Defendants' like motion for summary judgment made at the conclusion of the argument, both motions being based upon the pleadings, admissions, affidavits, records and files herein, George M. McLaughlin appearing as attorney for Plaintiffs, and Hellenthal, Hellenthal, and Cottis, appearing for the Defendants, and the court having heard the arguments of counsel, and having fully considered the evidence and having rendered its opinion on the 29th day of January, 1951, and having granted on

that same day the motion for summary judgment in favor of the Plaintiffs and against the Defendants,

Now, Therefore, It Is Ordered, Adjudged, and Decreed:

That the Plaintiffs were during all the times mentioned herein and now are the owners in fee simple and entitled to the possession of all that certain real property situated in the City of Anchorage, Alaska, and more particularly described as follows:

Lot Ten (10) of Block Forty-Two A (42A) of the South Addition of the City of Anchorage referred to and described in the complaint of the said Plaintiffs on file herein; that the claims of the Defendants, the City of Anchorage, Z. J. Loussac, B. W. Boeke, and Robert E. Sharp, and their successors and assigns are without any right whatever, and that said Defendants have no right, title, interest, or claim or estate whatsoever in or upon said real property, or any part thereof by virtue of a certain resolution of Defendant City of Anchorage entitled "Resolution No. 577, Sewer Assessments in Four Districts, Levy of Assessment" duly adopted by the City Council of said Defendant City of Anchorage, on the 18th day of October, 1950, and said Defendants and their successors and assigns are hereby enjoined and debarred from claiming or asserting any estate, right, title, interest in, or claim upon said real property, or any part thereof by virtue of said resolution.

It Is Further Ordered, Adjudged and Decreed:

That said Plaintiffs have and recover of and from the said Defendant, the City of Anchorage, the costs

and disbursements in this action incurred, to be taxed by the Clerk of the Court in the manner provided by law, and an attorney's fee in the sum of three hundred fifty Dollars.

Dated at Anchorage, Alaska, this 23rd day of March, 1951.

/s/ ANTHONY J. DIMOND,

District Judge.

Entered March 23, 1951.

Acknowledgment of Service attached.

[Endorsed]: Filed March 23, 1951.

—

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the City of Anchorage, et al, defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on March 23, 1951.

/s/ WILLIAM KRASILOVSKY,

For Hellenthal, Hellenthal &

Cottis, Attorneys for Defendants

Acknowledgment of Service attached.

[Endorsed]: Filed April 17, 1951.

[Title of District Court and Cause.]

ORDER

The Defendant City of Anchorage through its attorneys having filed herein, a motion supported by affidavit praying for an extension of time for filing the record and docketing the appeal in this cause with the Appellate Court; and it appearing to the satisfaction of this court that good reason exists for such extension, now therefore, it is

Ordered, Adjudged and Decreed that the defendant City of Anchorage have to and including the ninetieth day from the date of filing the notice of appeal in which to file the record and docket the appeal.

Done in open court at Anchorage, Alaska, the 26th day of May, 1951.

/s/ ANTHONY J. DIMOND,
District Judge.

Entered May 25, 1951.

[Endorsed]: Filed May 26, 1951.

[Western Union Telegram]

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Paul P. O'Brien, Clerk—

Court of Appeals Ninth Circuit Sfran—

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keting City of Anchorage vs. Ashley on grounds Reporter has been unavailable during extended time since Notice of Appeal Trial Judge has exhausted time to extend which time will expire midnight tonight record being airmailed today by clerk believe record can be abbreviated during requested period wire today if request granted—

Hellenthal, Hellenthal and Cottis

So Ordered

/s/ WILLIAM DENMAN,

Chief Judge, U. S. Court of Appeals for the Ninth Circuit

[Endorsed]: Filed July 17, 1951. Paul P. O'Brien, Clerk.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, M. E. S. Brunelle, Clerk of the above entitled Court, do hereby certify that pursuant to the provisions of Rule 11 (1) of the United States Court of Appeals for the Ninth Circuit, as amended, and pursuant to the provisions of Rules 75 (g) (o) of the Federal Rules of Civil Procedure, and pursuant to designation of counsel, I am transmitting herewith the original papers in my office dealing with the above entitled action or proceeding, and including specifically the complete record and file of such

action, such record being the complete record of the cause pursuant to the said designation.

The papers herewith transmitted constitute the record on appeal from the judgment filed and entered in the above entitled cause by the above entitled Court on March 23, 1951 to the United States Court of Appeals at San Francisco, California.

[Seal] M. E. S. BRUNELLE,
Clerk of the District Court for the Territory of
Alaska, Third Division.

/s/ By GERTRUDE KELLNER,
Chief Deputy.

[Endorsed]: No. 13016. United States Court of Appeals for the Ninth Circuit. The City of Anchorage, a Municipal Corporation, Z. J. Loussac, Mayor of the City of Anchorage, B. W. Boeke, City Clerk-Treasurer of the City of Anchorage, Robert E. Sharp, City Manager of the City of Anchorage, Appellants, vs. Arthur E. Ashley and Virginia Ashley, Appellees. Transcript of Record. Appeal from the District Court for the Territory of Alaska, Third Division.

Filed July 18, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13016

CITY OF ANCHORAGE, a municipal corporation,
Appellant,

vs.

ARTHUR E. ASHLEY and VIRGINIA
ASHLEY,

Appellees.

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY

1. The Court erred in holding the provisions of 16-1-81, 16-1-82, 16-1-83 of Alaska Compiled Laws Annotated 1949, also in Sections 2431, 2432, 2433 Compiled Laws of Alaska 933, also in Chapter 97, sections 63, 64, and 65 of Session Laws of Alaska 1923, to be mandatory.

2. The Court erred in holding the order of compliance with the above sections to be mandatory.

3. The Court erred in holding that the provisions and order of the above sections were not complied with.

4. The Court erred in granting summary judgment when there remained issues of fact, which issues clearly arose out of the pleadings and were at no time waived by appellants. These issues included the issue of fact as to estoppel of respondents and waiver of objections by respondents due to failure to

specifically object to the assessments at public hearing provided therefor.

5. The Court erred in denying Appellant's motion to dismiss filed on the 20th day of December, 1950.

Dated at Anchorage, Alaska this 1st day of August, 1951.

/s/ JOHN S. HELLENTHAL,

For Hellenthal, Hellenthal & Cottis
Attorneys for Appellants.

Acknowledgment of Service attached.

[Endorsed]: Filed Aug. 13, 1951. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

STIPULATION

Comes now Hellenthal, Hellenthal and Cottis, attorneys for the Appellant/Defendant in the above entitled action, and George McLaughlin, attorney for the Respondents/Plaintiffs in the above entitled action, and stipulate as follows:

That the only portion of the Court Reporter's Transcript of the above entitled action that shall be included in the record on appeal shall be as follows, and that the following statement is a correct statement:

Reporter's Transcript

Mr. Hellenthal: "I have checked the law and find that, unlike the old procedure where both parties moved for judgment on the pleadings, now under

Rule 56 the Court has some discretion under the summary judgment rule. I know now that plaintiffs had actual legal notice—and the record states the full facts; therefore, defendant City moves now for summary judgment in its favor on the pleadings in this case according to Rule 56''.

Dated at Anchorage, Alaska, this 16th day of July, 1951.

/s/ JOHN S. HELLENTHAL,
For Hellenthal, Hellenthal & Cottis
Attorneys for Appellant.

/s/ GEORGE M. McLAUGHLIN,
Attorney for Appellee.

[Endorsed]: Filed Aug. 13, 1951. Paul P. O'Brien,
Clerk.

No. 13,016

IN THE

United States Court of Appeals
For the Ninth Circuit

THE CITY OF ANCHORAGE, a Municipal
Corporation, Z. J. LOUSSAC, Mayor of
the City of Anchorage, B. W. BOEKE,
City Clerk-Treasurer of the City of
Anchorage, ROBERT E. SHARP, City
Manager of the City of Anchorage,

Appellants,

vs.

ARTHUR E. ASHLEY and
VIRGINIA ASHLEY,

Appellees.

On Appeal from the District Court for the Territory
of Alaska, Third Division.

BRIEF FOR APPELLANT.

FILED

DEC 28 1951

RALPH E. MOODY,

City Attorney, City of Anchorage,
Pearl Building, Anchorage, Alaska,

Attorney for Appellants.

PAUL P. O'BRIEN
CLERK

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No. 13,016

IN THE

**United States Court of Appeals
For the Ninth Circuit**

THE CITY OF ANCHORAGE, a Municipal
Corporation, Z. J. LOUSSAC, Mayor of
the City of Anchorage, B. W. BOEKE,
City Clerk-Treasurer of the City of
Anchorage, ROBERT E. SHARP, City
Manager of the City of Anchorage, }
Appellants,

vs.

ARTHUR E. ASHLEY and
VIRGINIA ASHLEY,

Appellees.

**On Appeal from the District Court for the Territory
of Alaska, Third Division.**

BRIEF FOR APPELLANT.

JURISDICTION.

This is an appeal taken from an order filed and entered in the District Court for the Third Division, Territory of Alaska, on the 29th day of January, 1951. This order granted a motion for summary judgment in favor of the Plaintiffs and against the Defendants. (R. 125.)

The District Court had jurisdiction in this proceeding by virtue of the provisions of Chapter 2, Alaska Compiled Laws Annotated, 1949, entitled "Actions by and Against Public Corporations and Officers", Section 56-2-2.

A complaint was filed in the District Court on the 4th day of December, 1950. (R. 3.) On the 22nd day of December, 1950, defendants, through their attorney, filed a motion to dismiss the action. (R. 9.) On the 26th day of December, 1950, plaintiffs filed motion for summary judgment. (R. 10.) Hearings on this motion were held on the 5th and 15th days of January, 1951. (R. 10.) On the 4th day of January, 1951 defendants' motion in response to plaintiffs' action for summary judgment was filed. (R. 46.) An opinion granting plaintiffs' motion for summary judgment was filed and entered the 29th day of January, 1951. (R. 125.)

On the 17th day of April, 1951, appellant filed notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit (R. 138) and an order allowing said appeal was duly and regularly signed and entered on the 20th day of April, 1951. On the 26th day of May, 1951, an order extending the time in which to file the record and docket the appeal to the ninetieth day from the date of filing the notice of appeal was duly and regularly signed and entered. (R. 139.)

The Ninth Circuit Court of Appeals has jurisdiction of said appeal by virtue of the provisions of Section 1291 (Chapter 83) of the Judiciary and Judicial Pro-

cedure Act, 28 U.S.C.A. (June 25, 1948, C 646, 62 Stat. 929). This appeal is governed by Section 8-c of the Act of February 13, 1925, as amended (28 U.S.C.A. 1294) June 25, 1948, C 646, 62 Stat. 930.

STATUTORY PROVISIONS INVOLVED.

Session Laws of Alaska, 1923:

Section 63. *Property Specially Benefited May Be Assessed For Cost of Local Improvements.*
When. The council may assess against the real property specially benefited by such improvements two thirds of the cost of laying out, grading, constructing or repairing any street, alley or sidewalk, constructing or repairing any sewer or drain, acquiring and constructing parks or play grounds or making changes in channels of streams or water courses or constructing, erecting, strengthening or repairing, bulkheads, embankments or dikes for such streams or water courses. Such costs shall be assessed against the real property specially benefited in proportion to the benefits so received by each tract of land. Provided, however, that no such assessment shall be levied for any improvement unless such improvement be in writing requested of the city council by the owners of at least one half in value of the property to be so specially benefited by such improvement. The expense so assessed may include the cost to the city of acquiring premises for such improvements.

Section 64. *Council Must Determine Necessity of Improvements and Sufficiency of Petition.*

When such request is presented to the council the same shall be filed and the council shall determine (1) whether the improvement requested is necessary and should be made, (2) whether the request is signed by all the owners of at least one half in value of the property specially benefited by such improvement and shall pass a resolution containing the council's findings on such questions, which findings shall be conclusive save and except that anyone who signs the name of another to such request without written power of attorney so to do, or who shall procure, solicit, aid or abet or induce another to do so, shall be guilty of forgery and shall be punished accordingly.

Section 65. *When Assessment Authorized.* If the council find that the improvement is necessary and that the request has been signed by the owners of at least one half in value of the property to be specially benefited, the council may also decide that any part of the cost of such improvement, not, however, to exceed two-thirds thereof, shall be (the) assessed against the real property so benefited in proportion to the amount of such benefits received, by each tract of property.

Compiled Laws of Alaska, 1933:

Section 2431. *Local improvement districts; assessments.* The council may assess against the real property specially benefited by such improvements two thirds of the cost of laying out, grading, constructing or repairing any street, alley or sidewalk, constructing or repairing any sewer or drain, acquiring and constructing parks or play grounds or making changes in channels of streams or water courses or constructing, erect-

ing, strengthening or repairing bulkheads, embankments or dikes for such streams or water courses. Such costs shall be assessed against the real property specially benefited in proportion to the benefits so received by each tract of land. Provided, however, that no such assessment shall be levied for any improvement unless such improvement be in writing requested of the city council by the owners of at least one half in value of the property to be so specially benefited by such improvement. The expense so assessed may include the cost to the city of acquiring premises for such improvements. (63-97-23).

Section 2432. *Council determines necessity of; sufficiency of petition praying for.* When such request is presented to the council the same shall be filed and the council shall determine (1) whether the improvement requested is necessary and should be made, (2) whether the request is signed by all the owners of at least one half in value of the property specially benefited by such improvement and shall pass a resolution containing the council's findings on such questions, which findings shall be conclusive save and except that anyone who signs the name of another to such request without written power of attorney so to do, or who shall procure, solicit, aid or abet or induce another to do so, shall be guilty of forgery and shall be punished accordingly. (64-97-23).

Section 2433. *Assessment; when authorized.* If the council find that the improvement is necessary and that the request has been signed by the owners of at least one half in value of the property

to be specially benefited, the council may also decide that any part of the cost of such improvement, not, however, to exceed two-thirds thereof, shall be assessed against the real property so benefited in proportion to the amount of such benefit received, by each tract of property. (65-97-23).

Alaska Compiled Laws Annotated, 1949:

Section 16-1-81. *Improvements for which assessment authorized: Property benefited: Amount of assessment: Owners' request for improvement.* The council may assess against the real property specially benefited by such improvements two thirds of the cost of laying out, grading, constructing or repairing any street, alley or sidewalk, constructing or repairing any sewer or drain, acquiring and constructing parks or play grounds or making changes in channels of streams or water courses or constructing, erecting, strengthening or repairing, bulkheads, embankments, or dikes for such streams or water courses. Such costs shall be assessed against the real property specially benefited in proportion to the benefits so received by each tract of land. Provided, however, that no such assessment shall be levied for any improvement unless such improvement be in writing requested of the city council by the owners of at least one half in value of the property to be so specially benefited by such improvement. The expense so assessed may include the cost to the city of acquiring premises for such improvements. (L 1923, ch 97, Sec. 63, p. 221; CLA 1933, Sec. 2431.)

Section 16-1-82. *Council to determine necessity of improvements and sufficiency of petition:*

Findings: Forgery. When such request is presented to the council the same shall be filed and the council shall determine (1) whether the improvement requested is necessary and should be made, (2) whether the request is signed by all the owners of at least one half in value of the property specially benefited by such improvement and shall pass a resolution containing the council's findings on such questions, which findings shall be conclusive save and except that anyone who signs the name of another to such request without written power of attorney so to do, or who shall procure, solicit, aid or abet or induce another to do so, shall be guilty of forgery and shall be punished accordingly. (L 1923, ch 97, Sec. 64, p. 221; CLA 1933, Sec. 2432.)

Section 16-1-83. *Decision of council as to improvement and assessment.* If the council find that the improvement is necessary and that the request has been signed by the owners of at least one half in value of the property to be specially benefited, the council may also decide that any part of the cost of such improvement, not, however, to exceed two-thirds thereof, shall be (the) assessed against the real property so benefited in proportion to the amount of such benefits received, by each tract of property. (L 1923, ch 97, Sec. 65, p. 222; CLA 1933, Sec. 2433.)

Section 16-1-92. * * * *Special assessments.* The city shall have the power to provide by ordinance for doing any or all work thereupon or therein authorized by this Act, and for the payment of the costs and expenses thereof by the levy and collection of special assessments therefor upon the property to be benefited thereby. That

is to say, the expense or cost of any work or improvements upon the streets, sewers, avenues, or public ways of such city shall be assessed upon the lots and lands fronting thereon, and adjoining, contiguous, proximate and non-contiguous in the improvement district proximate or specially benefited thereby; each lot being separately assessed for the full debt thereof in proportion to the benefits upon the property to be benefited, sufficient to cover the total expense of the work. (L 1927, ch. 56, Sec. 2, p. 97; CLA 1933, Sec. 2462.)

STATEMENT OF THE CASE.

On April 20, 1949, the City Council of Anchorage, Alaska, enacted Ordinance 1005 (R. 75) confirming the result of a special election held pursuant to Ordinance 193 (R. 67), providing among other things the construction of two trunk outfall sewer lines. On the same day the Council enacted Ordinance 1007. (R. 78.) Section 5 of this ordinance (R. 79) obliged the city to levy special assessments and pledge these assessments to repay the General Obligation Bonds authorized. On July 1, 1949 the contract for the construction of the sewer was let. (R. 127.) Between April 1 and prior to July 1, 1949, petitions were circulated and signatures obtained of a majority in number of the property owners asking for the construction of the sewer and consenting to the levy of the special assessment. (R. 54.) Appellees did not sign the petition but it contained the majority of signatures required to satisfy Section 16-1-81, et seq.,

ACLA, 1949. (R. 126, 127.) On March 1, 1950, Resolution 545 (R. 81) was enacted in conformity with the requirements of Section 16-1-82 (R. 127) finding the petition sufficient and the improvement necessary. On March 2, 1950, Resolution 570 (R. 85) was enacted assessing to each of the lots contained in the improved districts specially benefited in proportion to the benefit received by each lot by two-thirds of the cost of the improvement (R. 86). This resolution also set a date for hearings on objections to the assessments (R. 87) as well as notice by the city clerk as to the amount of the assessment to each owner of the properties benefited (R. 87). Appellees owned property so benefited by these improvements. They appeared at the hearing of the council held in accordance with Resolution 570, on September 29, 1950. The extent of their objection to the special assessment was to request "that the council assess a general tax and the whole sewer improvement be taken out of the General Tax Fund". (R. 38.)

On October 18, 1950, Resolution 577 was enacted (R. 88) levying the assessments as passed and fixing the time of delinquency payment and penalties.

On October 24, 1950 notice was mailed to appellees stating the amount of the assessments as finally settled and manner of payments. (R. 7.)

On December 4, 1950 a complaint was filed by appellees seeking to enjoin appellants from asserting in any manner any claim or lien adverse to the appellees by virtue of the assessment on appellees' property

on the grounds that the assessment and lien on appellees' land was contrary to the statutes of the Territory of Alaska. (R. 5.)

On December 22, 1950 appellants filed a motion to dismiss (R. 9) which was denied on December 29, 1950. On the same day appellees moved for summary judgment. (R. 10.) On January 5, 1951 appellants filed motion in response to appellees' motion for summary judgment contending the existence of factual issues. (R. 26.) Hearings were held on these motions on January 5 and 15, 1951.

On January 29, 1951 the District Court handed down a formal opinion (R. 125) granting appellees' motion for summary judgment on the ground that the statutes of the territory were not followed as held in *In re Ketchikan Delinquent Tax Roll*, 293 F. 577. (R. 130.)

SPECIFICATION OF ERRORS.

1. The Court erred in holding the provisions of 16-1-81, 16-1-82, 16-1-83 of Alaska Compiled Laws Annotated 1949, also in Sections 2431, 2432 and 2433, Compiled Laws of Alaska 1933, also in Chapter 97, Sections 63, 64 and 65 of Session Laws of Alaska, 1923, to be mandatory.

2. The Court erred in holding the order of compliance with the above sections to be mandatory.

3. The Court erred in holding that the provisions and order of the above sections were not complied with.

4. The Court erred in granting summary judgment when there remained issues of fact, which issues clearly arose out of the pleadings and were at no time waived by appellants. These issues included the issue of fact as to estoppel of appellees and waiver of objections by appellees due to failure to specifically object to the assessments at public hearings provided therefor.

5. The Court erred in denying appellants' motion to dismiss.

ARGUMENT.

SPECIFICATION OF ERROR 1.

Specification 1. The Court erred in holding the provisions of 16-1-81, 16-1-82, 16-1-83 of Alaska Compiled Laws Annotated 1949, also in Sections 2431, 2432, 2433, Compiled Laws of Alaska 1933, also in Chapter 97, Sections 63, 64 and 65 of Session Laws of Alaska 1923, to be mandatory.

SPECIFICATION OF ERROR 2.

Specification 2. The Court erred in holding the order of compliance with the above sections to be mandatory.

SPECIFICATION OF ERROR 3.

Specification 3. The Court erred in holding that the provisions and order of the above sections were not complied with.

The argument on these three specifications of error is presented together inasmuch as they involve the

same point, i.e., the provisions of Sections 16-1-81, et seq., of Alaska Compiled Laws, 1949, to be mandatory.

With respect to the text of the provisions in question (R. 126, 127) enacted by the Territorial Legislature in 1923, Session Laws of Alaska, Chapter 97 (R. 128, 129), it will be seen every enumeration or description of the new Act embraced in these sections concerns the method of assessment for local improvements. The argument as to the interpretation of the statute in its presently enacted form rests therefore alone upon the proposition that because the word "must" appears in the title of Section 64, Chapter 97 (R. 129) the detailed requirements are mandatory and the steps outlined must be taken in order.

But to adopt this construction, it is submitted, would cause the statute to create a limitation upon the authorities vested with its application, which the legislature had no intention of doing. When the original text, and which is new law, is taken into view, the conclusion inevitably follows that the purpose of the law was but to more specifically define the methods the council were to use in assessing real property owners for improvements benefiting their property. In other words, the only purpose of the law was to more fully deal with the subjects with which the provision as enacted dealt, and not by way of the legislature attempting to legislate every conceivable step to be taken by the council in the order in which it appears in the text.

In *United States v. Farenholt*, 206 U.S. 226 (1906), the Court said, page 229:

A court is not always confined to the written word. Construction sometimes is to be exercised as well as interpretation. And construction is the drawing of conclusions respecting subjects that lie beyond the direct expression of the text from elements known from and given in the text—conclusions which are in spirit, though not within the letter of the text.

In the construction of statutes certain rules have obtained, so that a Court may not be misled if these rules are followed. Human language being incapable of always accurately expressing the intentions of the legislature, recourse is had to the customs existing at the time of enactment of the law, in order that the actual intention of the legislature may be ascertained. This is not simply interpretation. Interpretation differs from construction in that it is used for the purpose of ascertaining the true sense of any form of words, while construction involves the drawing of conclusions that are not always included in the direct expression. But as a rule construction and interpretation of a statute arise after enactment. To illustrate, the administration of justice is conferred upon the Courts and the Courts perform that duty by ascertaining the facts in any given case and giving their conclusions by applying the laws to the facts at issue. In doing so, an interpretation of law is necessary. Where inferior Courts construe laws, their de-

cisions may be reversed by a higher Court or by the United States Supreme Court.

The intent of the legislature is the law, no matter what form of words are used to express that intent. Primarily, this intent is to be found in the words of the law itself, and the presumption attaches that the language used will furnish conclusive expression of that intent. Interpretation by the Courts often demonstrates the fact that men use words in such a manner as would establish a rule directly contrary with the intent of the lawmaking power.

In 25 *R.C.L.* 959, Section 215, under heading, "Meaning to be Given as of Time of Enactment," it is said:

There is always a tendency, it has been said, to construe statutes in the light in which they appear when the construction is given. It is easy to be wise after one sees the result of experience. The true rule is that statutes are to be construed as they were intended to be understood when they are passed. *United States v. Union Pacific Railroad Co.*, 91 U.S. 72; *Schuyler County v. Thomas*, 98 U.S. 169.

If the language of the statute considered as a whole and with due regard to its nature and object reveals that the legislature intended the word "shall" to be directory, it should be given that meaning. *United States v. Boyd*, 24 F. 692, 694 (C.C. S.D. N.Y., 1885), reversed on other ground, 116 U.S. 616; *United States v. Sixty Six Cases of Cheese* (C.C. E.D. N.Y., 1908), 163 F. 367.

Similarly the use of the word "must" does not make the provision mandatory. In *Skelly Estate Co. v. City and County etc.* (Sup. Ct. Calif. 1937), 69 P. (2d) 171, the Court, construing the validity of a tax levy employing "must", said, page 174:

The general use of the word "must" in an act does not *ipso facto* make the provision mandatory. Nor is the construction to be placed on a tax statute in which that word is used to be stricter, necessarily, than another statute not having taxation procedure for its subject matter. In *Rutledge v. City of Eureka*, 195 Cal. 404, 234 P. 82, 90, this Court aptly said: "There is no declaration in the section that its language is mandatory. The use of the word 'must' is not necessarily determinative of its mandatory import. The words 'shall' and 'must' are frequently construed as directory terms." *Cake v. City of Los Angeles*, 164 Cal. 705, 130 P. 723; *People ex rel. Thompson v. San Bernardino High School Dist.*, 62 Cal. App. 67, 216 P. 959.

It is true that the title of the Act of 1923, Chapter 97 of the Session Laws of Alaska, Section 64, contained the following:

Council must determine the necessity of improvement * * *

but it has been long held that the title is no part of the statute, and cannot be used to nullify the obvious meaning found in the text.

In *Hadden v. The Collector*, 5 Wall. 107, 72 U.S. 107 (1866), we find at page 110:

The title of an act furnishes little aid in the construction of its provisions * * * At the present day the title constitutes a part of the act, but is still considered as only a formal part; it cannot be used to extend or to restrain any positive provisions contained in the body of the act. It is only when the meaning of these is doubtful that resort may be had to the title, and even then it has little weight. *It is seldom the subject of special consideration by the legislature.* (Emphasis added.)

And in *United States v. Oregon and California Railroad Company*, 164 U.S. 526, 541 (1896), the Court said:

The title is no part of the act and cannot enlarge or confer powers, or control the words of the act unless they are doubtful or ambiguous.

The Court in *Patterson v. Bark Eudora*, 190 U.S. 169, 173 (1902), quoting Chief Justice Marshall on the extent to which a title can be used, laid down the rule:

Where the intent is plain, nothing is left to construction. Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived; and in such a case, the title claims a degree of notice, and will have its due share of consideration.

See also: *Mud River Co. v. Town of Walcott*, 81 A.(2d) 119, 122, 137 Conn. 680 (Sup.Ct. Conn.); *United States v. Jourden*, Alaska, 4 A. 354, 356 (D.C. 2nd Div. 1911).

We think the text of the ordinances does not support the construction or interpretation placed thereon by the District Court. But if the interpretation can be said to be a matter of doubt we can look to the construction given these ordinances by the authorities of the City of Anchorage. It appears that in the administration of these ordinances from the time of the enactment to the institution of this action they were construed by the authorities of the city council as applying to special assessments against property specially benefited by such improvements. Not only were they so construed, but the city council of Anchorage, when it adopted Ordinance #193 (R. 67) on March 5, 1947 and later adopted Ordinance #1005 (R. 76) on April 20, 1949 and Ordinance #1007 (R. 78) on April 20, 1949 they stated:

Section 5. The city hereby agrees that as soon as practicable after a legal petition for the construction and installation of the necessary additions, improvements and extensions to the present sewage system of the city has been filed and such work authorized, it will levy assessments against the property specially benefited by such improvements in a total amount not to exceed two-thirds of the cost thereof, payable in not more than five annual installments, and thereafter collect such installments and deposit the same in the Bond Redemption Fund hereinafter created, for the sole purpose of paying the principal of and interest on the bonds authorized herein.

If said petition is not received and the Common Council of the city creates a sewer improvement

district and levies and assesses part or all of the cost of such improvements against the property within such district specially benefited by such improvements, such assessments shall be made payable in not more than five annual installments and, when collected, shall be deposited in said Bond Redemption Fund and shall be used solely for the purpose of paying the principal of and interest on the bonds authorized herein.

* * * * *

So that if there could be said to be ambiguity in the law under which these ordinances were adopted, the construction placed upon them by the officers charged with their execution should be favored by the courts. *Luckenbach Steamship Co. v. United States*, 280 U.S. 173; *United States v. Alabama Great Southern Ry. Co.*, 142 U.S. 615; *United States v. Missouri Pacific Ry. Co.*, 278 U.S. 269; *United States v. Jackson*, 280 U.S. 183; *Taylor v. Tayrien* (C.A. 10), 51 F.2d 884.

In *City of Belton v. Brown Crummer Investment Co.*, 17 F.2d 70, 71, the Court said:

It can make no difference whether the ordinance authorizing the paving warrants was adopted at a regular or special meeting of this council, in view of the proof that all members of the council were present and participated in its adoption.

In *Schonfeld v. City of Seattle*, 265 F. 726, 730 (D.C. W.D. Wash. 1920), although the question decided by the Court was whether the constitutional rights of the plaintiff were violated by the city or-

dinance, the statement of the Court, in a practical sense, is applicable to the case before this Court. It was held:

The contention that the ordinance is invalid because, in its presentation and adoption, the rules of procedure with relation to the passage of the ordinances were not followed, we think is disposed of by the statement that the *rules of procedure are directory*, and the council has the power to suspend the rules for reasons deemed sufficient to the members of the council acting as a legislative body. (Emphasis added.)

In *Luckenbach Steamship Company v. United States*, supra, the Court said at page 182:

It is a settled doctrine of this Court that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced.

In *Great Northern Ry Co. v. City of Leavenworth*, 142 Pac. 1155, (Sup.Ct. Wash.) 1914, the city had initiated improvements prior to passing an ordinance covering such improvements. The law required that the council pass a resolution before work was to be done. Following completion and before any assessment was levied or attempted to be collected, a general ordinance had been passed covering that detail

and others which were attacked. The court said, page 1157:

* * * Prior to the passage of this general ordinance, as already stated, each step in the proceeding was directed by the city council, either by resolution or ordinance. There is no claim of fraud, collusion, or lack of sufficient notice. To now hold the assessment void because initiated prior to the passage of the general ordinance would be to give to the act an unwarranted construction.

Argument was made also in this case that the report of the engineer required by statute was jurisdictional, and because of defects therein "the assessment is void." To this the Court said, page 1157:

The property owners who appeared and objected to the improvement being undertaken did not point out any defect in or urge objection on account of the report of the engineer. The question was raised for the first time in the form of an objection to the confirmation of the assessment roll. The defect in the engineer's report not being jurisdictional matter, it was waived by the appellants who appeared before the council in response to the notice and failed to offer any objection touching the report.

* * * * *

The rule appears to be that, where a property owner makes objections to the assessment proceedings upon certain specified grounds, he thereby waives other objections which are not jurisdictional in the sense that they cannot be waived. The rule as stated in Page & Jones on Taxation by Assessment, Vol. 2, 1029 is:

If the property owner makes objection to the assessment proceedings upon certain specified grounds, such action is not merely an omission on his part to object on other grounds which he does not specify, but it also tends to mislead public authorities to believe that the grounds of objection thus urged are the only grounds upon which he intends to rely. Accordingly, the conduct of the property owner in filing certain specified objections is held to prevent him from subsequently relying upon other and different objections to defeat the assessment.

The City Council is a continuous body.

The District Court following *In re Ketchikan Delinquent Tax Roll*, 293 F. 577 held because of a special election on October 4, 1949, for the election of two members of the City Council (R. 128) the Council which passed the resolution of March 2, 1950 (R. 81) was not the identical council which authorized the work even though, through election, the membership may have been the same. The Court said:

The force of the opinion above quoted is not materially weakened by the fact that the assessment there made was under a statute which has since been repealed. This court is nevertheless bound by ruling that the steps must be followed in the order provided by statute without substantial deviation, and that one council is not permitted by ratification to validate in such a matter the acts of a previous council. (R. 133.)

We believe that the case before this Court is easily distinguished from the *Ketchikan* case upon

which the District Court relied. The District Court held, (R. 130) 95 F. Supp. 189:

* * * this Court in this action is controlled by the opinion and decision of the Circuit Court of Appeals for the Ninth Circuit, given in the year 1923, in the case of *In re Ketchikan Delinquent Tax Roll*, 293 F. 577, from which the following is quoted:

Section 627 of the Compiled Laws of the Territory of Alaska of 1913 provides as follows: That the said common council shall have and exercise the following powers: * * * Fourth: To provide for the location, construction, and maintenance of the necessary streets * * * If such street * * * is located and constructed *upon the petition of the owners of two-thirds in value of the property* * * *. (Emphasis added.)

The opinion of the District Court in *In re Ketchikan Delinquent Tax Roll*, supra, is reported in 6 Alaska 653. The District Court, after reviewing the facts, which disclosed three separate petitions filed for street extensions, said at page 657:

It is shown clearly that two-thirds of the property owners on the proposed * * * street extension had not petitioned therefor.

If the petitions did not meet the requirements set forth in the act, it is clear that any action taken by the common council was void.

In *Ogden City v. Shepard*, 168 U.S. 224, the Court considered an alleged invalid assessment levied to collect the cost of paving one of the public streets in

the city. There was a direct attack made upon the validity of the assessment, founded upon an alleged lack of jurisdiction on the part of the common council. The court said, page 237:

As we have seen, there was an entire want of jurisdiction in the common council to proceed *for want of the assent of the requisite proportion of property owners, and the assessment and tax were, therefore, void.* (Emphasis added.)

No such condition or circumstance is present in the case before this Court. "Petitions were circulated and signatures obtained of a majority in number of the property owners" (R. 127) and "were before the council on July, 1949, when the work was authorized." (R. 128.) We submit that the facts of the two cases, though subject to the same law, are sufficiently different. Hence, *In re Ketchikan Delinquent Tax Roll*, supra, is not in point.

Under the usual municipal organization the members of the city council are elected annually or biennially and thus part of the membership is renewed at such times. The Code of Ordinances, General Code, City of Anchorage, Alaska, Section 201.2 enacted April 12, 1950, (16-1-31 A.C.L.A., 1949) provides for a staggered election of members of the city council. In other words, the entire body is not retired at one time and a new body elected. As such it has been held to be a continuous council regardless of any change in its members. In *Denio v. City of Huntington Beach* (Sup. Ct. Calif., 1943), 22 Cal. (2d) 580, 140 P. (2d) 392, the Court held at page 397 of 140 P. (2d):

The council of a municipal corporation is a continuing body and in legal contemplation remains the same council regardless of changes in its personnel (citing cases).

The city council is a body unlike the Congress of the United States and the legislature of the state. As each Congress expires at the end of its period, the new Congress organizes itself over. The terms of the Representatives expire at the end of this period. The same is true of the Alaska Territorial Legislature. The city council, however, is a continuous body. In 37 Am. Jur. Municipal Corporations, p. 666 Sec. 50, it is stated:

A municipal council is not, like the legislature of a state, a body which exists only during the term of which its members are elected, and which is created anew at each election, but is a continuous body although its membership may be changed every year, or at some other period. As a result of this principle, business begun in a municipal council may be completed after its members have gone out of office and a new council has been elected.

In 43 C.J. Municipal Corporations, p. 491, Sec. 473, we find this statement:

* * * A municipal corporation is never without its governing body; and this body when duly organized is a continuous body, although there may be changes in its membership by reason of the expiration of the terms of its members, or because of vacancies occasioned by death, removal or other causes.

It has been held that the expiration of the terms of all members at the same time does not prevent the council from being a continuous body. A new council may take up proceedings which were left by the old council. *State (Booth) v. City of Bayonne* (Sup. Ct. N.J.), 56 N.J.L. 268, 28 A. 381, 382. In this case the Court was dealing with the question whether it would be within the power of the board of aldermen, *notwithstanding that an election had intervened*, to do certain administrative acts in carrying into effect street improvements authorized by the city charter and by an ordinance duly enacted. The Court holding in the affirmative said:

There can be no serious contention that every time there is an annual charter election in the city of Bayonne, wherein one-half of the council go out of office and their successors are elected, that all prior proceedings end, and must be again commenced. The city council is a continuous body, and, as to street improvements, the new city council can take up the proceedings where they were left by the old council, and proceed to carry out the provisions of the charter in reference thereto.

SPECIFICATION OF ERROR 4.

Specification 4. The Court erred in granting summary judgment when there remained issues of fact, which issues clearly arose out of the pleadings and were at no time waived by appellants. These included the issue of fact as to estoppel of appellees

and waiver of objections by appellees due to failure to specifically object to the assessments at public hearings provided therefor.

SPECIFICATION OF ERROR 5.

Specification 5. The Court erred in denying appellants' motion to dismiss.

The argument on these two specifications is presented together.

The trial Court erred in holding that estoppel did not operate against the plaintiffs.

The levying of special assessments as a means of paying, in part, for improvements of a public nature have long been in general use. The power to levy such assessments, their validity and apportionment upon the particular property improved must stem from statutory enactments, local acts and ordinances. *In re Ketchikan Delinquent Tax Roll*, 293 F. 577 (C.C.A., 1923.)

The ordinary elements of estoppel must not be present before an attempt to contest a special assessment can arise. Estoppel presupposes an error on one side and fault upon the other and some defect, which, if taken advantage of by the party against whom it is asserted, would be inequitable. *Leather Manufacturers Bank v. Morgan*, 117 U.S. 96, 108 (1885). The application of the doctrine of equitable estoppel is applied by the Courts in accordance with the above established principles regardless of the field of law involved.

In *Rothschild v. Title Guarantee and Trust Co.*, 204 N.Y. 458, 97 N.E. 879 (C.A.N.Y.) 1912, the Court said:

It is not necessary that an equitable estoppel rest upon a consideration or agreement or legal obligation. The courts apply it, in accordance with established general principles, in order that the transactions and dealings may result justly and fairly with the parties concerned with them * * * It does not require the positive, distinct action or language needed and intended to renew and ratify a transaction and make it valid and binding; it prohibits a person, upon principles of honesty and fair and open dealing from asserting rights, the enforcement of which would, through his omissions or commissions, work fraud and injustice.

In *Schmidt v. Village of Deer Park*, 78 N.E. (2d) 72 (C.A. Ohio) 1947, the Court in discussing the elements of equitable estoppel under circumstances which parallel the case at bar held, page 74:

Active participation in causing the improvement to be made will estop the party engaged therein from denying the validity of this assessment; but to create an estoppel from silence merely, it must be shown that the owner had knowledge:

1. That the improvement was being made;
2. That it was intended to assess the cost thereof, or some part of it, upon his property;
3. That the infirmity or defect in the proceeding existed which he is to be estopped from asserting; and

4. It must appear that some special benefit accrued to his property from such improvement which it is inequitable, under the circumstances, he should enjoy without compensation.

Substantially the same rules are set forth in *In re Ketchikan Delinquent Tax Roll*, 6 Alaska 653, affirmed 293 F. 577 (C.C.A., 1922).

On page 193 of 95 F. Supp. the trial Court erred in holding that:

There is no proof that at the time the work was done the plaintiffs had knowledge that it was intended to assess the cost of the improvements or some part of it upon their property, and therefore I find that estoppel does not operate against the plaintiffs in this case.

That the appellees *were on notice* of the special assessment to be levied is outlined on pages 67 to 71 of the transcript.

Pursuant to and as authorized by the Act of Congress of the United States, approved June 18, 1946 (H. R. J. 112), a special election was called to be held in the City of Anchorage, Alaska, on the 27th day of March, 1947. (R. 68.) Such special election was to determine whether the city shall construct a trunk outfall sewer line to serve a certain section of the city and in payment of construction costs to issue General Obligation bonds in the sum of \$225,000.00. (Proposition 4; R. 69.)

In Proposition 5 (R. 69), it was to be determined whether the City of Anchorage should issue General Obligation bonds, in the amount of \$225,000.00, for the purpose of expanding the present sewage system located in said city.

Appellees owned property located in the areas covered by these propositions. (R. 10, 11, 12, 13, 14.)

Ordinance No. 193 (R. 67) outlining in full Propositions 4 and 5, Section 6, states:

Notice of said election shall be given by posting written notice thereof at the United States Post Office in said city, on the bulletin board in the City Hall in said city, and at the corner of 4th Avenue and "E" Street in said city, all of which places are hereby found and declared to be conspicuous places within the corporate limits of said city. Said notice of election shall be posted at said designated places not less than twenty days prior to said election. (R. 71.)

Section 11 reads:

This Ordinance shall be published in the Anchorage Times, a newspaper published at Anchorage, Alaska, for two consecutive weeks. (R. 75.)

Section 12 reads:

This Ordinance shall take effect immediately upon its passage and approval, an emergency having been duly declared. (R. 75.)

Proposition 5 included also the manner in which the General Obligation bonds, including the interest

thereon, were to be handled. The proposition concludes with:

* * * and pledge the proceeds of *any special assessments* which the City may by law assess and collect for such local special improvements for the payment of the principal and interest of said bonds, all as authorized by the Act of Congress of the United States, H. R. J. 112, approved June 18, 1946? (R. 69, 70.) (Emphasis added.)

The election was held and approved by the voters. (R. 15.)

We submit, therefore, that the District Court erred in holding that there were no issues of fact remaining to be determined. For example:

1. Publication and posting of Notice of Election pertaining to sewage improvements constituted knowledge on part of Appellees.
2. Objection by Appellees of assessment before the City Council raised factual issues whether or not notice had been given.
3. Construction of sewage project and facilities abutting Appellees' property constituted knowledge.

Regarding the appellees, it is scarcely possible to believe that they were not aware of the steps taken by the City Council of Anchorage to effect the improvements, and thereafter issue its bonds, even though it should be admitted that the published notice of election was not legally sufficient. They were owners of land within the proposed district. The proceedings

were all of a public nature, and the public election was held before the bonds were issued. Of these facts, we say it is impossible to believe that the appellees did not have knowledge at the time of their occurrence. On the contrary, they entirely acquiesced in all the proceedings leading up to their vague objection raised before the council at the hearing provided. We submit, it was then too late to call in question the fact determined by the city council, and *a fortiori*, it is too late to raise the question in the case before this Court, where it is shown that the council of the City of Anchorage did everything possible to meet the letter of the law in the statutes referred to. Appellees appeared at the hearing following notice of the assessment and objected only "that the council assess a general tax and the whole sewer improvement be taken out of the General Tax Fund". (R. 38.) In doing so appellees failed to avail of their opportunity afforded by statute and make the objections to the assessments now urged upon the Court. Thus, all consideration of the present objection should be foreclosed. *Farncomb v. Denver*, 252 U.S. 7; *Milheim v. Moffat Tunnel Dist.*, 262 U.S. 710; *Gorham Mfg. Co. v. Tax Commissioner*, 266 U.S. 265; *First National Bank v. Weld County*, 264 U.S. 450.

In *Schmidt v. Village of Deer Park*, 78 N.E. (2d) 72 (1947), a case involving notice of assessment, the Court of Appeals, Ohio, said, page 73:

We do not think it is necessary to discuss the soundness of the plaintiffs' contention or the

basis of the trial court's decision, as we have reached the conclusion that the plaintiffs were in no position to assert defects in the legislation authorizing these improvements and assessments. It is our view that the plaintiffs by their inaction with full knowledge of the facts have waived whatever right they had to object.

In *Turner v. Sievers*, 126 N.E. 504, Appellate Court of Indiana (1920), the Court defined "color of law" utilizing estoppel as against the owner questioning the validity of an assessment. The Court said, page 507:

He bases this contention in part on a claim that Appellee, with knowledge that the alleged street was being improved by the city, and that an attempt would be made to assess the cost thereof against the abutting real estate, stood by during the progress of the work without making any objections thereto, and by reason of that fact is estopped to deny that the city did not have title to the alleged street. It may be conceded that an owner of property may be estopped, by his conduct, from questioning the validity of an assessment against the same although it is void because there was no actual legal authority upon which it could rest, if there is color of law to sustain the proceeding upon which such assessment is based.

"Color of Law" has been defined in Ballantine Dictionary (1930 Ed.) as the mere semblance of a legal right. *State of Iowa v. Des Moines*, 96 Iowa 521, 31 L.R.A. 186, 192, 65 N.W. 818.

A special assessment tax is an enforced contribution, a charge, an imposition by the city for city purposes or public needs. It is not founded upon either contract or agreement. As is said in 51 *Am. Jur.* Taxation, Section 5, pp. 38, 39:

A tax is a forced charge, imposition, or contribution; it operates in invitum, and is in no way dependent upon the will or contractual assent, express or implied of the person taxed.

See also:

Welch v. Henry, 305 U.S. 134, 146;

Danville Traction & Power Co. v. City of Danville, 168 Va. 430, 436, 191 S.E. 592, 594.

This case has been terminated by a summary judgment (F.R.C.P. Rule 56), and whether in so doing the trial Court erred is in issue.

Summary judgment is authorized only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, and that no genuine issue of fact remains for trial. The purpose of the rule is not to cut litigants off from their right of trial if they have issues of fact to try. The United States Supreme Court speaking through Mr. Justice Jackson, in *Sartor v. Arkansas Gas Corp.*, 321 U.S. 620, 623 (1943) said:

The summary judgment rule provides that "The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with affidavits, if any, show that * * * there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law".

Rule 56, *Federal Rules of Civil Procedure*, Section (c) provides:

* * * The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material facts and that the moving party is entitled to a judgment as a matter of law * * *

The summary judgment procedure is not a substitute for the trial of disputed issues of fact. *Blood v. Fleming* (C.A. 10, 1947), 161 F. (2d) 292, 295. The Appellate Court in this case considered the question, paralleling the question in the case at bar, whether the trial Court erred in entering a summary judgment. At page 295 the Court said:

The rule was intended to provide against the vexation and delay which come from the formal setting for trial of those cases in which there is no substantial dispute on issues of fact. It was not intended to and should not be used as a substitute for a regular trial of cases in which there are disputed issues of fact upon which the outcome of the litigation depends.

It is also the duty of the Court to exercise extreme care in deciding whether a real issue of fact exists. *DeSavitsch v. Patterson*, 81 U.S. App. D.C. 358, 159 F. (2d) 15 (C.A.D.C. 1946). *Michel v. Meier*, 8 F.R.D. 428 (D.C.W.D. Mo., 1950).

In *Clark v. Taylor* (C.A. 2, 1947), 163 F. (2d) 940, the Court paid the following tribute to summary judgment process. On page 948 the Court said:

Of course, expedition should not be the sole aim of procedure. It should never be purchased at the expense of preventing a fair trial. *For that reason, this court and others have discountenanced the use of a summary judgment, based on a mere written record, when it deprives one of the parties of a trial affording him the opportunity to cross examine important witnesses whose credibility may critically affect decision on issues of fact.* (Cases cited.) (Emphasis added.)

Summary judgment is not proper where the facts are uncertain and, as in the case at bar, require additional evidence to make them clear. In *Chemical Foundation, Inc. v. Universal-Cyclops Steel Corporation* (D.C.W.D. Pa. 1942), 2 F.R.D. 283, the Court said, page 284:

Rule 56 was intended to grant relief by way of summary judgment where the facts appear certain from the pleadings, depositions, admissions and affidavits. It was not the intention that a summary judgment should be entered where the facts are uncertain and require evidence to make the same clear. It was not the intention of rule 56 that a case should be tried by affidavits as a substitute for trial in the usual way in open court, where the right of cross examination exists.

And on page 285, the Court continues:

The pleadings, depositions, admissions and affidavits leave uncertain what the facts are as to the above contested claims of the plaintiff and of the defendant. The pleadings and affidavits raise

issues of fact. They are genuine issues as to the material facts relating to said claims. I am, therefore, of the opinion that the motion for summary judgment should be refused and that the facts should be developed by evidence taken before a special master, or by the court.

CONCLUSION.

It is submitted (1) that the record clearly shows that the appellees had notice of the proposed improvement; that they were aware of the special assessment to be levied to cover the costs of the special improvement; that they stood by and allowed the improvement to be made, benefiting their property, and therefore they are precluded from raising the issues presented in this case; (2) that the Court erred in holding that the sequence in which the council acted was not in accordance with the statutes; (3) that the Court erred in holding that the council was not a continuous body and that its action was void; (4) that the Court erred in holding that there were no factual issues remaining to be determined.

The purpose of municipal corporations is first to serve the local inhabitants by regulating and promoting community affairs. And second, to serve the people residing in the locality in common matters as an agency of the State or Territory. As such the welfare and health of the inhabitants is uppermost in the minds of the municipal authorities. And such police power exercised by ordinances of the council

has been looked upon with favor by the Courts where every attempt has been made by the council to follow the law.

The City Council enacted the challenged ordinances affording the local inhabitants of the areas prescribed protection and security from any and all disease emanating from the lack of proper sewage. To challenge these ordinances on suppositious technicalities is merely an attempt to avoid that which morally is their duty.

For the foregoing reasons the judgment of the District Court should be reversed.

Dated, Anchorage, Alaska,
December 21, 1951.

Respectfully submitted,

RALPH E. MOODY,

City Attorney, City of Anchorage,

Attorney for Appellants.

No. 13,016

IN THE

**United States Court of Appeals
For the Ninth Circuit**

THE CITY OF ANCHORAGE, a Municipal
Corporation, Z. J. LOUSSAC, Mayor of
the City of Anchorage, B. W. BOEKE,
City Clerk-Treasurer of the City of
Anchorage, ROBERT E. SHARP, City
Manager of the City of Anchorage, }
Appellants,

vs.

ARTHUR E. ASHLEY and
VIRGINIA ASHLEY,
Appellees.

**On Appeal from the District Court for the Territory
of Alaska, Third Division.**

BRIEF FOR APPELLEES.

GEORGE M. McLAUGHLIN,
Reed Building, Anchorage, Alaska,
Attorney for Appellees.

FILED

JAN 24 1952

PAUL B. O'BRIEN

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No. 13,016

IN THE

**United States Court of Appeals
For the Ninth Circuit**

THE CITY OF ANCHORAGE, a Municipal Corporation, Z. J. LOUSSAC, Mayor of the City of Anchorage, B. W. BOEKE, City Clerk-Treasurer of the City of Anchorage, ROBERT E. SHARP, City Manager of the City of Anchorage, }
Appellants,

vs.

ARTHUR E. ASHLEY and
VIRGINIA ASHLEY,

Appellees.

On Appeal from the District Court for the Territory
of Alaska, Third Division.

BRIEF FOR APPELLEES.

JURISDICTION.

This is an appeal taken from a final judgment in favor of appellees filed and entered in the District Court for the Third Division, Territory of Alaska, on the 23rd day of March 1951. (R. 138.)

The District Court had jurisdiction in this proceeding by virtue of the provisions of Chapter 2, Alaska

Compiled Laws Annotated, 1949, entitled "Action by and Against Public Corporations and Officers," Section 56-2-2.

The Ninth Circuit Court of Appeals has jurisdiction of said appeal by virtue of the provisions of Section 1291 (Chapter 83) of the Judiciary and Judicial Procedure Act, 28 U.S.C.A. (June 25, 1948, c. 646, 62 Stat. 930). This appeal is governed by Section 8-C of the Act of February 13, 1925, as amended (28 U.S.C.A. 1294) June 25, 1948, c. 646, 62 Stat. 930.

STATEMENT OF THE CASE.

On July 1, 1949, appellant, The City of Anchorage, let a contract for the construction of certain sewer lines. (R. 62.) Substantial work was done on the sewer lines, and some were in operable condition (R. 21) when the appellant, by its City Council, on March 1, 1950, enacted its Resolution No. 545 (R. 81) "retroactively" finding that the construction of the sewer lines was necessary and should be made, that the petitions of the property owners at the time of the letting of the contract were "legally sufficient" and were signed by the owners of at least one-half in value of the property to be specially benefited, and that the council "hereby decides that two-thirds of the cost of the sewer improvements herein mentioned shall be assessed against the real property so specially benefited". (R. 81, 82, 83, 84, 85.) Although Resolution 545 referred to prior "resolves" of the City Council and implied that the City Council had taken some ac-

tion prior to March 1, 1950, "and prior to the commencement of construction", the whole minutes of the proceedings of the City Council were introduced and no "prior resolves" appeared. (R. 14-45, 98-125.) Subsequent to the enactment of Resolution 545, and by virtue of Resolution 570 (R. 85) and Resolution 577 (R. 88), the appellant imposed a special assessment lien on appellees' property on the ground that it was specially benefited by the sewer line improvement. The appellees instituted the present action, and subsequently made a motion for summary judgment (R. 10) *and appellant made a like motion for summary judgment stating that "the record states the full facts"*. (R. 143, 144.) On January 29, 1951, the court granted appellees' motion for summary judgment. (R. 135.)

ARGUMENT.

I.

Appellant, City of Anchorage, in order to impose a valid assessment on appellees' property was required, prior to letting the contract or beginning construction of the sewer, to determine by formal action: whether the sewer improvement was necessary and should be made; whether the request for the improvement was signed by all the owners of at least one-half in value of the property specially benefited, and whether the cost of improvement should be paid by special assessment.

The law in Alaska requiring municipalities to take formal action by their councils, *prior* to contracting for or constructing the improvement, if it is intended to assess the cost of the improvement against the benefited land owners, is set forth in the case of *In Re Ketchikan Delinquent Tax Roll, City of Ketchikan v. Furnivall*, 293 Fed. 577 (C.C.A. 9th 1923), hereinafter referred to as the *Ketchikan* case. In the *Ketchikan* case, containing a fact situation almost identical with the facts here on appeal, the Circuit Court of Appeals said:

“On the 5th day of October 1920, a petition was presented to the common council of the City of Ketchikan, praying for the construction of a certain roadway and sidewalk and the establishment of a right of way therefor; the petitioners agreeing to pay their proportionate share of two-thirds of the costs of improvement and that the same be a specific lien upon their respective properties abutting on the improvement. The petition was approved and ordered filed upon presentation to the city council, and the city clerk was directed to call for bids for the work at the next regular meeting. So far as the record discloses no other or further action was taken by the city council until a resolution was adopted on February 2, 1921 assessing two-thirds of the costs of the improvements against certain persons and the lands owned or occupied by them, and declaring the sums so assessed a specific lien upon the lands. On May 20, 1922 the delinquent tax roll for the city for the year 1921 was presented to the court under the provisions of Chapter 69 of the Session Laws of Alaska of 1913, for adjustment and or-

der of sale of the property therein described. At the same time there was presented the delinquent assessment roll for the improvement in question. The appellee, Furnivall, filed objections to the assessment and order of sale and after hearing before the court the objections were sustained. From that order the present appeal is prosecuted.

“In the course of its opinion the court below said: ‘It being clearly shown that two-thirds of the property owners abutting on the proposed Harris Street extension had not petitioned therefor, this is jurisdictional and as to the non-consenting owners, the whole proceedings are illegal.’ But the court made no further finding on that issue. The court further held, however, that inasmuch as the improvement and assessment against the abutting property was not provided by ordinance or resolution, the whole proceeding was void, and on this latter ground we are of opinion that the judgment of the court should be affirmed. The power to locate, construct and maintain streets, and more especially the power to impose a tax upon abutting property owners is a legislative one, and can only be exercised by ordinance or resolution. 28 Cyc. 992: *Chicago & N.P.R. Co. v. City of Chicago*, 174 Ill. 439, 51 N.E. 596; *Eckert v. Town of Walnut*, 117 Iowa 106, 91 N.W. 929; *Zalesky v. Cedar Rapids*, 118 Iowa 714, 92 N.W. 657, *McQuillans Municipal Corporations* p. 1334. Furthermore, under the Alaska Statute, the discretion to levy upon abutting property to pay two-thirds of the cost of an improvement must be exercised when the petition for improvement is heard, and before, or at the time the improvement is ordered. Most assuredly

one city council cannot make an improvement, and some other city council at some later day exercise the discretion to impose a part of the burden upon abutting property owners. The assessment is therefore void, and the judgment is affirmed.”

The rule set forth in the *Ketchikan* case, is set forth more completely in the lower court opinion of Judge Reed wherein he said:

“There is no showing that an ordinance or resolution was passed by the city council, either by the minutes of the council or by the oral testimony submitted at the hearing. A discretion is given the city council to determine whether the cost of a public improvement shall be borne wholly by the city at large or two-thirds thereof by the abutting property. At the time the improvement is decided upon by the council, it should also determine how the cost thereof should be borne. If this is not done, the whole proceeding would be left to the decision of a city council after the work is finished, without opportunity for owners to protest or object.

As is said in *Eckert v. Town of Walnut*, supra:

‘If no ordinance or resolution were required in such cases (altering or establishing grades of streets) the owner of such property would be practically at the mercy of the everchanging personnel of the city or town government, and his property rights and values might be shifted at their own sweet will, because of his inability to show their unrecorded vagaries.’

The case at bar shows the necessity of an ordinance. No notice of the manner of the proposed

improvement was given to the objecting property owners; no opportunity to protest or object before the improvement was contracted for; an assessment was levied by a subsequent council without prior notice or any equalization or opportunity for the owners of property to be heard. The proceedings were irregular and cannot be sustained.”

Reed J., *In re Ketchikan Delinquent Tax Roll*
(1st Division, Ketchikan July 27, 1922) 6
Alaska 653, at 663.

It is worthy of comment that the *Ketchikan* case opinion was based upon Section 627 of the Compiled Laws of the Territory of Alaska, 1913, no longer in effect, which read as follows:

“That the said common council shall have and exercise the following powers: * * * Fourth. To provide for the location, construction and maintenance of the necessary streets, alleys, crossings, sidewalks, sewers and wharves. If such street, alley, sidewalk, or sewer, or parts thereof is located and constructed upon the petition of the owners of two-thirds in value of the property abutting upon and affected by such improvement, then two-thirds of the cost of the same may, in the discretion of the council, be collected by the assessment and levy of a tax against the abutting property, and such tax shall be a lien upon the same * * *”

Almost a year subsequent to the publication of the lower court opinion in the *Ketchikan* case, the legislature of the Territory of Alaska repealed Section 626,

and enacted Section 64, Chapter 97, Session Laws of Alaska 1923, which is now Section 16-1-82 of the Compiled Laws of Alaska. There may have been some question whether the former Section 627 made it mandatory that Alaskan municipalities take formal action by their councils, prior to contracting for or constructing the improvement, in order to assess the costs against benefited land owners; the lower court and the appellate court decided in the *Ketchikan* case that the language of Section 627 made such formal action necessary. The Legislature in repealing Section 627 and enacting Sections 64 and 65 Chapter 97, Session Laws of 1923, left no doubt of the mandatory nature of such prior, formal action. Section 64 reads:

“Section 64. COUNCIL MUST DETERMINE NECESSITY OF IMPROVEMENTS AND SUFFICIENCY OF PETITION. When such request is presented to the council the same shall be filed and the council shall determine (1) whether the improvement requested is necessary and should be made, (2) whether the request is signed by all the owners of at least one-half in value of the property specially benefited by such improvement, and shall pass a resolution containing the council’s findings on such questions, which findings shall be conclusive save and except that anyone who signs the name of another to such request without written power of attorney so to do or who shall procure, solicit, aid or abet or induce another to do so, shall be guilty of forgery and shall be punished accordingly.”

“Section 65. WHEN ASSESSMENT AUTHORIZED. If the council find that the im-

provement is necessary and that the request has been signed by the owners of at least one-half in value of the property to be specially benefited, the council may also decide that any part of the cost of such improvement, not, however, to exceed two-thirds thereof, shall be assessed against the real property so benefited in proportion to the amount of such benefits received, by each tract of property.”

By the legislature’s employment of the word “must” in the subtitle of Section 64 whereby the “Council must determine necessity of improvements and sufficiency of the petitions”, it was made clear that certain preliminary action was made mandatory on the City Council. The fact that the word “must” appears in the title does not detract from its mandatory nature. These subtitles are expressive of the legislative intent and were declared to be, in *Earle v. Holman* (Sup. Ct. Oregon 1936), 61 P. (2d) 1242 at 1245:

“a part of the enrolled bill as enacted by the Legislature. They are as much a part of the act itself as anything else contained in it and are to be resorted to in case of ambiguity or doubt as to the legislative intent. These subtitles and subheads as found in the act passed by the Legislature are not to be confused with the subtitles and explanatory headings in any codification of Oregon statutes. In so far as the explanatory headings in the Code are not found in the original session laws, they are no part of the statutes themselves and were merely inserted by the Code publishers for convenience in reference.”

The legislature, in enacting Section 64, was precise in laying down and enumerating the conditions precedent to the levy of a valid assessment. It required under Sections 64 and 65, that:

(a) the petition be presented to the council and filed with it.

(b) that the council thereupon determine whether the improvement "requested" is necessary and "should be made" (the use of the word "should" indicates that it was never contemplated that the improvement would be authorized and constructed before the council made its determination).

(c) the council determined whether the request is signed by all the owners of at least one-half in value of the property specially benefited by such improvement.

(d) the council shall thereupon pass a resolution containing the above findings.

(e) "if" the council makes all the above findings, it may also decide, at that time, that an assessment may be made (the clause contained in Section 65 declaring that "the council may also decide" indicates that the prior findings are mandatory and are conditions precedent to the decision to assess).

The appellant, City of Anchorage, on the record, has made the following preliminary compliances with the statute:

(a) Petitions were “presented” to the Council (R. 93), with the fair probability that they did not remain “filed” because they were being circulated and signed after the sewer construction contract was let. (R. 96.) No other action was taken by the council except to let the sewer construction contract. (R. 62.)

(b) The council, prior to letting the contract, never determined whether the improvement “requested” was necessary and should be made. The whole record of the minutes of the council is bare. There was no determination.

(c) The council, prior to letting the contract, never determined whether the request was signed by all the owners of at least one-half in value of the property specially benefited by such improvement. The whole record of the minutes of the council is bare. There was no determination.

(d) The council, prior to the letting of the contract, did not pass a resolution containing the above findings. The whole record of the minutes of the council is bare. There was no resolution.

(e) The council, prior to letting the contract, never decided to make an assessment.

Stress is placed on the absence in the record of the minutes of the meetings of the city council of any action taken by appellant. That record is the only competent evidence of appellant’s legislative actions.

5 McQuillin’s Municipal Corporations (3rd Ed.) pp.

16, 17, 18, 19. The most that appellant, on appeal, can suggest to show conformity with the statute is that "petitions were circulated and signatures obtained of a majority in number of the property owners" (R. 127) and "were before the council when the work was authorized". (R. 128.) "Nothing in the minutes of the council indicates that any action was taken on the petitions or with respect to them at that time. It was not until March 2, 1950 that a resolution was passed in conformity with the requirements of Section 16-1-82, finding the petition sufficient and the improvements necessary." (R. 128.) In fact, a review of the minutes indicates that the minutes contain no record of the existence of the petition at that time. Only the affidavits of City employees establish the fact of the petition's existence. (R. 92, 95, 96.)

The appellant by implication in its argument suggests that the trial court and the Appellate Court should be impressed by the irrelevant election returns pursuant to Ordinance 193 (R. 67) which only authorized a bond issue but which did not compel the levy of a special assessment for the sewer improvement. The point is unworthy of argument.

Appellant argues that the "construction" placed by the City Council on the assessment statute (Appellants' Brief, page 18) should be favored by the courts; but in fact, there was and is no evidence of a prior "construction" of the city council before the trial court or before the Appellate Court on appeal. The "construction" which appellant insists upon is

that the City Council had authority to cure retroactively or retrospectively the attempted levy of assessment by the passage of Resolution 545. This "construction" of appellant runs counter to the general law concerning retrospective or retroactive legislation respecting special assessments. McQuillin declares:

"Law must authorize improvements when made. To justify the levy of an assessment against land to pay for local improvements there must be in existence, at the time the improvement is made, a valid law authorizing the same. A law subsequently passed cannot be made retrospectively to authorize the assessment. This is the general rule usually enforced."

14 McQuillin, *Municipal Corporations* (3rd Ed.), P. 60, § 38.08.

This rule accords with the weight of authority set forth in *American Jurisprudence*:

"Under a provision common to many improvement acts that before proceedings may be commenced there must be passed by the common council of the city a resolution of necessity, it is held generally that the declaration of necessity for the improvement is a distinct act from, and precedes, the order that the improvement shall be made. It is the commencement of the proceeding, and it is indispensable to give the council jurisdiction as is process or the voluntary appearance of parties in civil actions to give jurisdiction to a court. It is the first of several steps, which, if duly and regularly taken, may result in fixing a lien upon the property of the citizen,

and even in depriving him of it against his will. Therefore, if this step is not taken, the whole proceeding is a nullity.”

48 *Am. Jur.* p. 683—“Special or Local Assessments”.

This is the rule adopted by inference in the *Ketchikan* case. Thus Judge Bishop declared in *Zalesky v. City of Cedar Rapids et al.* (Supreme Court of Iowa, Dec. 17, 1902), 118 Iowa 714, 92 N.W. 657, at 660 (cited with approval in *In re Ketchikan Delinquent Tax Roll* (C.C.A. 9th), *supra*):

“The appellants contend that, even conceding the defects to which attention has been called, the same were cured, and a valid levy of assessment accomplished, by virtue of the resolution of February 15, 1901, and the notice served pursuant thereto. [Resolution read in part: ‘Whereas, by reason of the omission of certain words doubts arise as to the sufficiency of the resolution heretofore passed ordering a permanent cement sidewalk, built on that part of Eighth Street and Ninth Avenue abutting upon and laying along the front and side of lot five. * * * Be it therefore resolved by the City Council * * * that the said sidewalk as above described be and is hereby re-ordered.’] and the further resolution of March 8, 1901, [Resolution read in part: ‘Be it resolved by the City Council * * * that the assessment to W. Zalesky for the building of a permanent sidewalk * * * made on November 16, 1900, be and the same is hereby confirmed, and there is hereby reassessed against said property for the building of said sidewalk the said sum of \$117.91, this

assessment to relate back and stand as of the date of the original assessment.']

Section 836 of the Code is relied upon as a basis for such contention. Granting even that the chapter of the Code of which said section is a part has application to the matter of construction of sidewalks,—a point we do not decide—still there is no merit in the contention of appellants. The defects which may be cured by a relevy of assessment are such only as inhere in the time or manner of the proceeding, the machinery of the law having once been properly put in motion. It was not intended that jurisdictional defects can be cured by proceeding as therein directed. Under the ordinance in question, the adoption of a resolution is a prerequisite to any further step being taken. Without that step there is no authority whatever to further proceed. The case is altogether different from one where, having authority to proceed, irregularities and defects in the subsequent proceedings thereafter occur, which do not have the effect to take away or impair any substantial right of a party interested. While having reference to a different section of the statute, yet the principle announced in the *City of Chariton v. Holliday*, 60 Iowa 391, 14 N.W. 775 is applicable. That was the case in which recovery was sought under the provisions of Section 479, Code 1873, which provides in effect that under certain specified conditions a recovery may be permitted for public improvements, notwithstanding informality, irregularity or defects in the proceedings under which such improvements were made. In the course of the opinion it is said: 'The irregularity or defect under which this sec-

tion can be disregarded must, we think be a mere error or omission to do something which in no manner affects the jurisdiction of the city. It is fundamental that, unless jurisdiction has been acquired, the proceedings of all courts are void, and this must be so as to municipal corporations.' " Parenthical matter supplied.

If the City Council of the City of Anchorage did have power to validate retroactively a non-existent proceeding, it might have validated a petition which had become outdated and inexpressive of the property owners' desires. Thus in *Vennum v. Village of Milford*, 202 Ill. 423, 66 N.E. 1040 (1903) a petition for a street improvement in a village of less than 10,000 inhabitants, signed by one-half of the abutting owners and a majority of the resident property owners affected, was filed June 23rd and an ordinance passed authorizing the improvement. On August 11th the county court, in a proceeding to confirm the assessment, declared that the ordinance was invalid. So, on September 26th the original petition was refiled. Held, that the petition could not confer authority on the board of local improvements to adopt another ordinance, as the ownership of the property affected may have materially changed. The court stated at page 1041:

"A petition which had the requisite number of qualified petitioners in June 1902 may or may not have contained the names of the requisite number of persons who were residents of the village and owners of property abutting on or to be affected by the improvement in September of

that year. After the adoption of the ordinance which was found to be invalid, and after the petition of the city for a judgment confirming a special tax under such ordinance had been denied, and the petition of the village dismissed, the petition of the property holders which was the basis of the invalid ordinance has no further life or vitality. It could not confer authority on the board of local improvements to proceed to the adoption of another ordinance in the month of September 1902."

II.

The trial court properly granted the motion for summary judgment because there were no issues of fact to be determined.

The judgment in this cause resulted from appellee's motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure and appellant's like motion for summary judgment made at the conclusion of the argument. (R. 125.) The appellant has stipulated that its attorney did declare in open court that:

"I have checked the law and find that, unlike the old procedure where both parties moved for judgment on the pleadings, now under Rule 56 the Court has some discretion under the summary judgment rule. I know now that plaintiffs had actual legal notice and the record states the full facts; therefore defendant City moves now for summary judgment in its favor on the pleadings in this case according to Rule 56." (R. 143.)

If the record states the full facts, then no further facts were available, and on those facts the trial court was compelled to apply the law because the only *issue* remaining was the question of law. Where the full facts are before the court, summary judgment lies. The principle was recently restated in *United States v. Dollar*, 100 F. Supp. 881 (D.C., N.D., Cal., S.D., 1951) at 885:

“In response to this showing the Government has done nothing. It has presented no opposing affidavits, no depositions or counter admissions. Although in oral argument it hinted at some ‘other evidence’, it failed to produce it in response to the motion. Obviously, the whole purpose of the summary judgment procedure would be defeated if a case could be forced to trial by merely contending that an issue exists, without any showing of evidence.”

Counsel for appellant has stipulated that the full facts were before the trial court. (R. 143, 144.) The facts before the trial court were, as stated in plaintiffs affidavits in support of their motion for summary judgment that:

(a) Plaintiffs were never aware of any legal invalidity in the sewer assessment proceedings until after the sewer construction was completed. (R. 11, 13.)

(b) Plaintiffs were never aware that a special assessment was to be levied for the construction of sewers. (R. 11, 13.)

Appellants in their answering affidavits never denied or repudiated these assertions by plaintiffs but

merely declared that "whatever protest was made by the Ashleys failed to specify any reason why the assessment was claimed void." (R. 46, 47, 48.) (But see R. 33, 36.)

Appellant in its brief declares "that the appellees *were on notice* of the special assessment to be levied is outlined on pages 67 to 71 of the transcript" (Appellant's Brief page 28); the contention being that Ordinance No. 183 gave *notice* to the appellees because it would authorize the appellant city to issue General Obligation Bonds and to "pledge the proceeds of any special assessments *which the City may by law assess and collect*" to secure payment of said bonds. (Emphasis supplied.) (R. 68.)

Even conceding, for the purposes of argument, that the election was "notice" to the appellees and conceding, a fact not shown, that they were even present in the territory at the time of the election, the election could only give *notice* to the appellees that the city had authority under territorial law to levy a special assessment; the appellees may be said to have the same notice by virtue of the existence of Sections 16-1-81, 16-1-82, and 16-1-83, A.C.L.A. 1949. It suffices to say that neither the election nor the ordinance ever attempted to, did, or could, authorize a special assessment.

There is no evidence in the record indicating that the appellees at the time of the election were present or resident in the Territory of Alaska, and appellant produced nothing of evidentiary weight to indicate plaintiffs' knowledge.

Appellant cites the rule of estoppel of *Schmidt et al. v. Village of Deer Park*, 78 N.E. (2d) 72 (Ohio 1947), under which appellant has the obligation, in order to create an estoppel from silence merely, to prove that appellees had, not *notice*, but *knowledge* of *all* the following:

1. That the improvement was being made;
2. That it was intended to assess the cost thereof, or some part of it, upon their property;
3. That the infirmity or defect in the proceeding existed which they are to be estopped from asserting.

Appellant has introduced no evidence of the appellees' knowledge that it was intended to assess the cost of the improvement against appellees' property, except the alleged "notice" of election; appellant does not even argue that appellees knew of the infirmity or defect in the proceeding.

The rule of *Schmidt v. Village of Deer Park*, *supra*, is the law of Alaska. As stated in *In Re Ketchikan Delinquent Tax Roll*, 6 Alaska 653 (1922), at 667:

"As to Shelton, Hendrickson and Groellinger being estopped a different question arises. Under the facts shown at the hearing, none of these parties were signers of the petition. There is no testimony that any of them participated in or encouraged the building of the sewer, or had any knowledge that their property was to be assessed for two-thirds of the cost of the improvement thereof. It is argued by counsel for the city that they are estopped to raise any question because

of their silence in permitting the work to proceed without raising any question as to the irregularity of the proceedings. I am unable to concur in this view of the law. The rule laid by the authorities as to estoppel by silence is thus summed up in *Tone v. Columbus*, 39 Ohio St. 303, 48 Am. Rep. 438, which case is cited with approval by the Supreme Court in several leading cases:

‘When the improvement is of a public street upon which the owner’s property abuts, before the duty to speak can be said to exist, which is so imperative that if he keeps silent then, he shall not afterwards be heard, it must be shown:

First: That he knew the improvement was being made. * * *

Second: That he had knowledge that the public authorities intended, and were making the improvement upon the faith, that the cost thereof was to be paid by the abutting property owners, and that an assessment for that purpose was contemplated. * * * Because cities may improve the public streets out of the general fund and without a special assessment.

Third: That he knew of the infirmity or defect in the proceedings under which the improvement was being made, which would render such assessment invalid and which he is to be estopped from asserting.

“At least, in the absence of any evidence of previous knowledge on his part of their unlawful action, he is in time with his protest, when they proceed to deprive him of his rights under such proceedings. * * *”

Fourth: Some special benefit must have accrued to the owner's property distinct from the benefits enjoyed by the citizens generally.'

In the case at bar no opportunity was afforded these objectors prior to the assessment to protest against the work, no notice was given them that their property would be assessed for any part of the cost of the improvement. There is no showing by the city in the testimony that they had knowledge that the city contemplated assessing the cost of the improvement against the abutting property and there is no showing that they had any knowledge of the defect in the proceedings. They have therefore the right—to object and insist upon any defect in the proceedings anterior to the assessment itself because of no ordinance or resolution providing for the improvement and assessment of the abutting property, which I deem necessary as an initiatory step under Section 628 of the Compiled Laws."

As stated by Williams J. in the leading American case of *City of Moundsville v. Yost et al.*, 75 W.Va. 250, 83 S.E. 910 (1914), at p. 912:

"The bill alleges that notice was given to Mary A. Seamon, the then owner of the lot to appear and show cause, if any she could, why the assessment should not be made for the street improvement; that she failed to appear and to object thereto; and that therefore the defendants are now estopped to object to the legality of the assessment. It may be that, if the objection related only to a mere irregularity in the proceeding, the present owner would be estopped by the failure of his predecessor in title to make objection before the

assessment was made. But the objection relates to more than a mere irregularity. It strikes at the jurisdiction of the council to proceed in violation of the mandate of its charter, and involves the very right and power of the city to make a binding special assessment in a manner different from the only method provided by the statute. The right to make local assessments depends upon legislative grant of power which in this case is given. But the power must be exercised in the particular mode prescribed by the statute. The void resolution is the only basis for the illegal special assessment, and the invalidity of the resolution renders void all subsequent proceedings, so far as they relate to the rights of property owners. Hence the defendant E. H. Yost is not estopped to deny the validity of the lien. No one is estopped to assail collaterally proceedings which are wholly void. *People ex rel. Kochersperger v. Hurford*, 167 Ill. 226, 47 N.E. 368; *Strout v. City of Portland*, 26 Or. 295, 38 Pac. 126; *Jorgenson v. City of Superior*, 111 Wis. 561, 87 N.W. 565; *Coggeshall v. City of Des Moines*, 78 Iowa 235, 41 N.W. 617, 42 N.W. 650; *Starr v. City of Burlington*, 45 Iowa 87; *Bradley v. City of Centerville*, 139 Iowa 600, 117 N.W. 968; *Fox v. Middlesborough Town Co.*, 96 Ky. 262, 28 S.W. 776; *Verdin v. City of St. Louis*, 131 Mo. 26, 33 S.W. 480, 36 S.W. 52; *App v. Stockton*, 61 N.J. Law 520, 39 Atl. 921; *Burnett v. Boonton*, 73 N.J. Law 453, 63 Atl. 995."

And this is the rule in Alaska as acquired from the decisions of the Oregon Courts and as stated by Judge

Moore in *Strout v. City of Portland*, 26 Or. 294, 38 Pac. 126 (1894), at p. 127:

“An examination of the record discloses that the court was fully warranted in its conclusion that the common council had not acquired jurisdiction to make the improvement, and the only question presented by this appeal is whether the plaintiffs, one of whom signed the petition for the improvement, are estopped by their silence and apparent acquiescence from questioning the regularity of the proceedings. The assessment of property for a local improvement is always a proceeding in invitum, and rests upon the theory that the property of the citizen has been benefited to the extent of the amount assessed against it; but before such property can be charged with any part of the cost of the improvement the common council must, in the manner prescribed in the City Charter, acquire jurisdiction of the person and the subject matter; for, without it, the right to assess such property for benefits conferred does not exist, nor should it, as a grant of such power would make the common council not only the agent of the owner, but his guardian as well.

But it is contended that the plaintiffs knowing that the improvement had been ordered should have informed the council of the irregularity in the proceedings, and, not having done so or made any objection to the improvement until it was completed, should now be estopped from taking advantage of these jurisdictional defects. The property owner is not the legal adviser of the common council, which usually has an attorney for this purpose. He is not required to interfere with the mode adopted to acquire jurisdiction, nor is he expected to object or protest after the

proper initiatory steps have been taken, except to the mode or manner of the improvement, or some intermediate order or proceeding of the common council which injuriously affects his property. Jurisdiction to improve a street is only obtained by the common council in the manner prescribed in the City Charter, and not by anything the property owner did or failed to do; and he is no more estopped from questioning the council's jurisdiction upon the facts than he would be from questioning the jurisdiction of a judicial tribunal which should attempt to deprive him of his property. *Canfield v. Smith*, 34 Wis. 381. Objection to the jurisdiction of the person may be waived by the parties interested, but want of jurisdiction of the subject matter is never thus waived. (*Damp v. Town of Dane*, 29 Wis. 432, *In re Sharp*, 56 N.Y. 257) nor is a party who undertakes to waive it estopped from afterwards questioning the validity of the proceedings (*Ruhland v. Town of Hazel Green*, 55 Wis. 664, 13 N.W. 887). While there is quite a conflict of opinion upon this subject, we think the trend of modern decisions, as well as the weight of authority and better reason, serves to establish the following rules as applicable thereto: (1) When, in proceedings for the levy of an assessment, the common council is without jurisdiction from the beginning, a person whose property is benefited by a local improvement is not estopped to deny the validity of the proceedings on the ground that he made no objection thereto while the improvement was in progress. *Starr v. Burlington*, 45 Iowa 87; *Keese v. City of Denver*, 10 Colo. 112, 15 Pac. 825; *Coggeshall v. Des Moines*, 78 Iowa 235, 41 N.W. 617, and 42 N.W. 650; *Stephens v.*

Daniels, 27 Ohio St. 527; *Kiphart v. Railway Co.* (Ind. App.) 34 N.E. 375; *Fayssoux v. Succession of Baroness DeChaurand*, 36 La. Ann. 547; *Mulligan v. Smith*, 59 Cal. 206. (2) But, if, after jurisdiction has been acquired the owner of property benefited by a local improvement, with knowledge of its progress, permitted its completion without objection, he will be estopped from questioning mere irregularities occurring in the subsequent proceedings. *Elliot, Roads & S.* 420; *Wilson v. Salem*, 24 Or. 504, 34 Pac. 9; *Barkley v. Oregon City*, 24 Or. 515, 33 Pac. 978. It follows from these rules that the plaintiffs who did not sign the petition are not estopped by their silence or apparent acquiescence while the improvement of said street was in progress from questioning the proceedings of the common council; and the plaintiff who petitioned the common council to improve the street did not thereby waive his right to have the proceedings conform to the mode prescribed in the charter. (*McLauren v. Grand Forks*, 6 Dak. 397, 43 N.W. 710; *Howell v. Tacoma*, 3 Wash. 711, 29 Pac. 447; *Mayor etc. v. Porter*, 18 Md. 300; *Steckert v. East Saginaw*, 22 Mich. 104; *Tone v. Columbus*, 39 Ohio St. 281; *Taylor v. Burnap*, 39 Mich. 739; *In re Sharp*, supra); and therefore he is not estopped to question them. His petition fairly construed meant that the common council should proceed to the improvement of the said street in the manner authorized by law, and he never consented to the improvements being made in any other mode. The common council not having acquired jurisdiction to make said improvement, the plaintiffs have a right to challenge the validity of its proceedings and it follows that the decree of the court below must be reversed."

Accord: *Town of Ketchikan v. Zimmerman*, 4 Alaska 336 (1911), at 345 (Citing *Strout* case, *supra*, with approval).

The appellant makes much of the "obligation" of appellees to make "objection" to the levy of special assessment; there is certainly no obligation set forth by Territorial statute. Provision for objections is made under Section 16-1-96, A.C.L.A. which reads:

§16-1-96 "Time for objections to assessment. The regularity or validity of said assessment may not in any manner be contested or questioned by any proceeding whatsoever by any person not filing objections to such assessment roll prior to the same being confirmed." (L. 1927, ch. 56, §6, p. 99; C.L.A. 1933, §2466.)

But this statutory provision for objection applies and refers *only* to the *additional* method of sewer improvement assessment created by the Territorial Legislature in 1927. (§16-1-91, 16-1-92, 16-1-93, 16-1-94, 16-1-95 A.C.L.A. 1949, L. 1927, ch. 56.) There are no such mandatory statutory provisions under the statutory method of assessment which appellant tried to choose.

CONCLUSION.

It is submitted that the appellant's attempted levy of assessment is invalid and violates the general rule of statutory construction set forth in 14 McQuillin, *Municipal Corporations* (3rd Ed.), § 38.07, page 54:

"Construction of Power: Power to make public improvements does not of itself confer the power

to levy and collect special taxes or assessments to defray the costs of such improvements. Moreover as a municipal corporation has no inherent power to levy and collect such charges, and as the exercise of such power is in derogation of the right of private property, the law involved should be strictly construed, in determining whether the power exists and in case of any fair and reasonable doubt, the doubt should be resolved against the existence of the power and the power denied. Thus, under charter authority to assess to "the owners of property" two-thirds of the cost of street improvements, an assessment of the two-thirds against abutting owners was held invalid.

The nature and extent of such power must be determined from the express grant, and municipal authorities must adhere strictly to its terms, for any material departure therefrom especially of a jurisdictional nature, is fatal to the validity of the assessment. This is to say that in levying special assessments or taxes due observance of all mandatory and jurisdictional provisions of the applicable law is indispensable. All limitations expressed or implied therein must be strictly observed. If the applicable law prescribes the mode of exercising the power, the mode prescribed must be followed, or the assessment will be void; and in this connection it should be mentioned that the passage of a valid ordinance or resolution declaring the necessity for or the intention to make the improvement is a condition precedent to the right to levy the assessment. It is jurisdictional."

This strict statutory construction is in accordance with public policy:

“In the construction of the grant of any power to tax made by the state to one of its municipal corporations, the rule accepted by virtually all the authorities is that it should be with strictness. A citizen cannot be subjected to the burden of taxation without clear warrant of law.”

16 McQuillin, *Municipal Corporations* (3rd Ed.), § 44.13, p. 42.

“This is not only in accordance with the general rule that construes sovereign grants with strictness, it is also obviously wise. The mischief of a strict construction is easily obviated by the legislature; but the mischief of a liberal construction may be irremediable before it can be reached.”

1 Cooley, on *Taxation* 469 (3rd Ed.).

In conclusion, if there were any “mischief” of a strict construction in the trial court’s decision it was obviated by the Territorial legislature in 1951 by the passage of a reassessment statute (Ch. 99, Session Laws of Alaska, 1951).

For the foregoing reasons the judgment of the District Court should be sustained.

Dated, Anchorage, Alaska,
January 25, 1952.

Respectfully submitted,

GEORGE M. McLAUGHLIN,

Attorney for Appellees.

No. 13017

United States
Court of Appeals
For the Ninth Circuit.

COMET THEATRE ENTERPRISES, INC.,
Appellant,
vs.

LEON CARTWRIGHT, WILLIAM E. WILSON,
Cartwright & Wilson Construction Co., a Co-
partnership and Cartwright & Wilson Construc-
tion Co., a Corporation,
Appellees.

Transcript of Record

Appeal from the United States District Court,
Southern District of California,
Central Division.

FILED

SEP 6 1951

PAUL P. O'BRIEN

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

CLERK

No. 13017

United States
Court of Appeals
For the Ninth Circuit.

COMET THEATRE ENTERPRISES, INC.,

Appellant,

vs.

LEON CARTWRIGHT, WILLIAM E. WILSON,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

MAURICE J. HINDIN,
111 West Seventh St.,
Los Angeles 14, Calif.

For Appellees:

TRIPP & CALLAWAY,
210 West Seventh St.,
Los Angeles 14, Calif.

In the District Court of the United States, Southern
District of California, Central Division

No. 12351—WM

COMET THEATRE ENTERPRISES, INC., a
Corporation,

Plaintiff,

vs.

LEON CARTWRIGHT, WILLIAM E. WILSON,
CARTWRIGHT & WILSON CONSTRUCTION CO., a Co-partnership; CARTWRIGHT
& WILSON CONSTRUCTION CO., a Corporation,

Defendants.

COMPLAINT

(Money Had and Received)

Comes Now the plaintiff and for cause of action
against the defendants, and each of them, alleges:

I.

That plaintiff is a corporation organized and
existing under and by virtue of the laws of the
State of California and has and maintains its principal
place of business within the County of Los
Angeles, State of California.

II.

The defendants, and each of them, are citizens of
the State of Utah.

III.

That this is a controversy of a civil nature between citizens of different states, and that the matter involved herein exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3,000.00).

IV.

That on or about the 25th day of January, 1950, the defendants, and each of them, became indebted to the plaintiff in the sum of Three Thousand Five Hundred Dollars (\$3,500.00), for and on account of money had and received by the defendants, and each of them, to the use and benefit of the plaintiff herein.

That, although demand has been made upon the defendants, and each of them, therefor, no part of the said sum has been paid, and that there is now due, owing and unpaid from the defendants, and each of them, to the plaintiff the sum of Three Thousand Five Hundred Dollars (\$3,500.00).

Wherefore, plaintiff prays for judgment against the defendants, and each of them, in the sum of Three Thousand Five Hundred Dollars (\$3,500.00), for costs of suit, for interest from the date of filing of this complaint, and for such other and further relief as to the Court may seem meet and just in the premises.

/s/ MAURICE J. HINDIN,
Attorney for Plaintiff.

Duly verified.

[Endorsed]: Filed September 28, 1950.

[Title of District Court and Cause.]

ANSWER

Come Now the defendants Leon Cartwright and Cartwright & Wilson Construction Co., a co-partnership, and for answer to the complaint on file herein admit, deny and allege:

I.

Defendants have no information or belief upon which to answer the allegations contained in paragraph I and upon that ground deny generally and specifically each, every and all of the allegations contained therein.

II.

Generally and specifically deny each, every and all of the allegations contained in paragraph IV and specifically deny that there is due and owing from defendants to plaintiff the sum of \$3,500.00, or any other sum whatsoever, whether for the reasons alleged in said paragraph, or otherwise, or at all.

Wherefore, defendants pray that plaintiff take nothing by reason of its complaint on file herein; that defendants be awarded their costs of suit incurred herein; and for such other and further relief as to the court may seem proper in the premises.

TRIPP & CALLAWAY,

By /s/ HULEN CALLAWAY,

Attorneys for Defendants.

Duly verified.

[Endorsed]: Filed November 20, 1950.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is an action on a common count for money had and received.

Defendants are a co-partnership engaged in the general contracting business in Salt Lake City, Utah. They were unlicensed to do a building contracting business in the State of California. Defendants were employed by plaintiff in connection with the construction of a drive-in theatre in Pasadena, California, in connection with which said construction defendants supervised certain of the work, consulted with and furnished certain plans and specifications to plaintiff's architect and arranged for two or more experienced sub-contractors to come to Pasadena from Utah to do various parts of the work.

The sum of \$3,500.00 was paid defendant by plaintiff on January 25, 1950, which they seek to recover in this action by virtue of the fact that defendants were not licensed as building contractors in the State of California. The evidence yields the following:

Findings of Fact

1. The plaintiff was at all times material to the issues herein a corporation organized under the laws of the State of California. The defendants were at all times material to the issues herein citizens and residents of the State of Utah.

2. The plaintiff was making a claim for an amount exceeding \$3,000.00 exclusive of interest and

costs against the defendants which said claim grows out of payment to defendants of the sum of \$3,500.00 on January 25, 1950, in connection with certain services rendered plaintiff in connection with construction of a drive-in theatre in Pasadena, California.

3. The defendants were unlicensed as building contractors by the State of California at all times material to the issues herein involved.

4. The Court finds that the contract between plaintiff and defendant was illegal but that the payment of \$3,500.00 to defendants was voluntarily made for services actually rendered.

Conclusions of Law

The Court concludes that the plaintiff is not entitled to recover for the payment of \$3,500.00 to defendants in that, even though the contract between plaintiff and defendant was illegal by reasons of the fact that the defendants were not licensed as building contractors in the State of California at the time material to the issues herein, said payment was voluntarily made for services actually rendered by defendants to plaintiff.

Dated: This 31st day of May, 1951.

/s/ WM. C. MATHES,

United States District Judge.

Affidavit of Service by Mail attached.

Lodged May 31, 1951.

[Endorsed]: Filed May 31, 1951.

In the District Court of the United States in and
for the Southern District of California, Central
Division

No. 12351—WM

COMET THEATRE ENTERPRISES, INC., a
Corporation,

Plaintiff,

vs.

LEON CARTWRIGHT, et al.,

Defendants.

JUDGMENT

This cause having been heard on the pleadings and proof and having been argued and submitted by counsel of the respective parties and the Findings of Fact and Conclusions of Law having been heretofore filed and signed and defendants' cost having been duly taxed at the sum of \$48.85 on motion of Hulen C. Callaway, Esq., counsel for defendant,

It Is Hereby Ordered, Adjudged and Decreed that the plaintiff take nothing by reason of said action as against defendants.

May 31, 1951.

/s/ WM. C. MATHES,

United States District Judge.

Approved as to Form:

/s/ MAURICE J. HINDIN,

Attorney for Plaintiff.

Lodged May 31, 1951.

[Endorsed]: Filed May 31, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Comes now the plaintiff and appeals to the United States Court of Appeals for the Ninth Circuit from the judgment heretofore made and entered in the above-captioned action on or about the 1st day of June, 1951, and from the whole thereof and from the Order of the Court made on or about the 14th day of June, 1951, denying plaintiff's motion for a new trial and from the whole thereof.

Dated: June 21st, 1951.

/s/ MAURICE J. HINDIN,
Attorney for Plaintiff and
Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 21, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 20, inclusive, contain the original Complaint; Answer; Findings of Fact and Conclusions of Law; Judgment; Motion for New Trial; Order Denying Motion for New Trial; Notice of

Appeal and Designation of Record on Appeal which constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 18th day of July, A. D. 1951.

[Seal]

EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 13017. United States Court of Appeals for the Ninth Circuit. Comet Theatre Enterprises, Inc., Appellant, vs. Leon Cartwright, William E. Wilson, Cartwright & Wilson Construction Co., a Co-partnership and Cartwright & Wilson Construction Co., a Corporation, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed July 19, 1951.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 13017

COMET THEATRE ENTERPRISES, INC., a
Corporation,

Plaintiff and Appellant,

vs.

LEON CARTWRIGHT, et al.,

Defendant and Respondent.

CONCISE STATEMENT OF POINTS RELIED
ON BY APPELLANT AND DESIGNATION
OF RECORD

A concise statement of the points relied on by appellant pursuant to Rule 19 is as follows:

1. A contract for building contracting services which requires a license by the person performing the services is absolutely void if performed by a unlicensed person.

2. Persons purporting to render contracting services may not recover for their services nor may they retain money paid to them on account of such services unless they hold a valid contractor's license issued under California Business and Professions Code Sections 7025 to 7031, inclusive, and 7052 to 7057, inclusive.

3. The California Contractors License Law is a statute enacted for the protection of the public, and

persons paying money to such unlicensed contractor are not in *peri delicto* with such unlicensed contractor and may recover payment therefor.

Designation of Record Which Is Material
to Consideration of Appeal

The following portions of the record are material in consideration of the appeal:

1. Complaint.
2. Answer.
3. Findings of Fact and Conclusions of Law.
4. Judgment.
5. Notice of Appeal.
6. Clerk's Certificate.

Respectfully submitted,

/s/ MAURICE J. HINDIN,
Attorney for Plaintiff and
Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 25, 1951.

No. 13017.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

COMET THEATRE ENTERPRISES, INC.,

Appellant.

vs.

LEON CARTWRIGHT, WILLIAM E. WILSON, Cartwright
& Wilson Construction Co., a Copartnership, and Cart-
wright & Wilson Construction Co., a Corporation,

Appellees.

APPELLANT'S OPENING BRIEF.

MAURICE J. HINDIN,

111 West Seventh Street,

Los Angeles 14, California,

Attorney for Appellant.

FILED

SEP 26 1951

PAUL P. O'BRIEN, CLERK

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No. 13017.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

COMET THEATRE ENTERPRISES, INC.,

Appellant.

vs.

LEON CARTWRIGHT, WILLIAM E. WILSON, Cartwright
& Wilson Construction Co., a Copartnership, and Cart-
wright & Wilson Construction Co., a Corporation,

Appellees.

APPELLANT'S OPENING BRIEF.

Statement of Pleadings and Jurisdictional Basis.

This appeal is taken from the judgment in favor of the defendant rendered after trial before the District Court of the United States for the Southern District of California, Central Division. The complaint sounds in a common count for money had and received and the answer is in the nature of a general denial [Tr. pp. 3, 4, 5]. Recovery was sought of money paid to the defendants under a void agreement.

Jurisdiction of the District Court is based upon diversity of citizenship. The plaintiff is a California corporation and maintains its principal place of business within Los Angeles County, California. The defendants and each of them are citizens of Utah [Tr. pp. 3, 6] and the amount of money involved in the controversy exceeds \$3,000.00 [Tr. pp. 4, 6 and 7].

Concise Statement of Facts of the Case.

No dispute exists with reference to the facts in this case. Defendants are a co-partnership engaged in the general contracting business in Salt Lake City, Utah. The defendants were employed by plaintiff, a California corporation, in connection with the construction of a drive-in theatre by the plaintiff in Pasadena, California. The defendants performed general contracting services in connection with this employment which consisted of supervision of work by subcontractors, consultation with architects, arranging for and supervising two or more subcontractors to do various jobs in connection with the construction of the theatre. The defendants also furnished plans and specifications and held consultations with plaintiff's architect [Tr. pp. 6, 7].

The defendants at no time held any license to engage in building contracting work within the State of California or to perform the services they did. All of the services rendered by defendants were rendered in Pasadena, California [Tr. pp. 6, 7].

The plaintiff paid the defendants \$3,500.00 on account of these services. The plaintiff by this action sought to recover the said \$3,500.00 upon the theory that under the law of California the agreement between the plaintiff and defendants was illegal and wholly void in that defendants did not have or hold the required building contractor's license and that under the law of California the defendants could not legally retain this money though it was voluntarily paid. Judgment went for the defen-

dants. The plaintiff's motion for a new trial was denied and plaintiff now prosecutes this appeal.

The Trial Court found that the agreement between the plaintiff and the defendants was illegal but denied plaintiff's recovery on the theory that since the payment was made voluntarily the court would leave the parties to this illegal contract where it found them and give no relief to the plaintiff.

Question of Law Presented on This Appeal.

The sole question presented on this appeal is whether or not as a matter of law a party who has voluntarily made payment to an unlicensed defendant for contracting services performed by the defendant, which by State law required the defendant to hold a valid contractor's license, may recover the money once it has been paid.

ARGUMENT.

A Contract for Building Contracting Services Which Requires a License by the Party Performing Such Services Is Absolutely Void if Performed by an Unlicensed Party.

This appeal involves the interpretation and application of Sections 7026, 7028, 7030, 7031, 7055 and 7057 of the Business and Professions Code of the State of California. These Sections are set forth for convenience of the court as follows:

Sec. 7026. *“Contractor”*: *Defined*. The term contractor for the purposes of this chapter is synonymous with the term “builder” and, within the meaning of this chapter, a contractor is any person, who undertakes to or offers to undertake to or purports to have the capacity to undertake to or submits a bid to, or does himself or by or through others, construct, alter, repair, add to, subtract from, approve, move, wreck or demolish any building, highway, road, railroad, excavation or other structure, project, development or improvement, or to do any part thereof, including the erection of scaffolding or other structures or works in connection therewith. The term contractor includes subcontractor and specialty contractor. (Amended by Stats. 1949, ch. 90, Sec. 1.)

Sec. 7028. *Engaging in business without license*. It is unlawful for any person to engage in the business or act in the capacity of a contractor within this State without having a license therefor, unless such person is particularly exempted from the provisions of this chapter. (Added by Stats 1939, ch. 37, Sec. 1, p. 384.)

Sec. 7030. *Acting without license or conspiring to violate chapter: Misdemeanor*. Any person who acts in the

capacity of a contractor without a license, and any person who conspires with another person to violate any of the provisions of this chapter, is guilty of a misdemeanor. (Added by Stats. 1939, ch. 37, Sec. 1, p. 384.)

Sec. 7031. *Allegation and proof of license in action on contract.* No person engaged in the business, or acting in the capacity of a contractor, may bring or maintain any action in any court of this State for the collection of compensation for the performance of any act or contract for which a license is required by this chapter without alleging and proving that he was a duly licensed contractor at all times during the performance of such act or contract. (Added by Stats. 1939, ch. 37, Sec. 1, p. 384.)

Sec. 7055. *Branches of contracting business.* For the purpose of classification, the contracting business includes any or all of the following branches:

(a) General engineering contracting.

(b) General building contracting.

(c) Specialty contracting. (Added by Stats. 1945, ch. 1159, Sec. 1.)

Sec. 7057. *General building contractor.* A general building contractor is a contractor whose principal contracting business is in connection with any structure built, being built, or to be built, for the support, shelter and enclosure of persons, animals, chattels or movable property of any kind, requiring in its construction the use of more than two unrelated building trades or crafts, or to do or superintend the whole or any part thereof.

This does not include any one who merely furnishes materials or supplies under Section 7045 without fabricating them into or consuming them in the performance of the work of the general building contractor. (Added by Stats. 1945, ch. 1159, Sec. 3.)

In construing and applying the foregoing Code sections, the Supreme Court of California has established that a contract for the performance of services by an unlicensed contractor, who is required to be licensed under the provisions of State law above referred to, is wholly void (as distinguished from being voidable).

The latest expression of the Supreme Court on this subject is found in the case of *Loving & Evans v. Blick*, 33 Cal. 2d 603. The Supreme Court of California in that case, commencing at page 607, uses the following pertinent language:

“There can be no question but that this case presents a clear violation of the statutes regulating the contracting business. Thus, while respondent Loving at all times possessed an individual contractor’s license, his respondent partner Evans did not, and the partnership, as such, failed to procure such a license. As appellant maintains, it has been repeatedly declared in this state that ‘a contract made contrary to the terms of a law designed for the protection of the public and prescribing a penalty for the violation thereof is illegal and void, and no action may be brought to enforce such contract.’ (*Gatti v.*

Highland Park Builders, Inc., 27 Cal. 2d 687, 689, 166 P. 2d 265; see also, *Haas v. Greenwald*, 196 Cal. 236, 247, 237 P. 2d 38, 59 A. L. R. 1493; *Wise v. Radis*, 74 Cal. App. 765, 774-776, 242 P. 90; *Holm v. Bramwell*, 20 Cal. App. 2d 332, 335-337, 67 P. 2d 114; *Phillips v. McIntosh*, 51 Cal. App. 2d 340, 343, 124 P. 2d 835); and that 'whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case.' (*Firpo v. Murphy*, 72 Cal. App. 249, 253, 236 P. 968; see also, *Chateau v. Singla*, 114 Cal. 91, 94, 45 P. 1015, 55 Am. St. Rep. 63, 33 L. R. A. 750; *Moore v. Moore*, 130 Cal. 110, 113, 62 P. 294, 80 Am. St. Rep. 78; *Levinson v. Boas*, 150 Cal. 185, 193, 88 P. 825, 11 Ann. Cas. 661, 12 L. R. A. N. S. 575.)"

This rule was also enunciated in *Franklin v. Goldstone*, 33 Cal. 2d 628.

The services for which the defendants in the case now on appeal received \$3,500.00 from plaintiff were such services as required them to hold a valid contractor's license under Section 7057 of the Business and Professions Code. This they did not hold or possess. It is clear under California law that the defendants could not have successfully maintained an action for the collection of their fees had they sought to enlist the court's aid in collecting the same. The question is therefore raised as to whether or not this is the type of an action where the court will permit a party who has voluntarily paid money under such a void contract to recover the same. This matter will be discussed under the next point of argument.

II.

The Plaintiff Is Not in *Pari Delicto* With the Defendants Who Are Unlicensed Contractors and Under the Established Law of California Is Entitled to Recover the Money Paid by Them Under a Contract Which Is Wholly Void.

While under the general law a person cannot recover money paid by them to another under an illegal contract where both parties are equally guilty (because the court will leave persons who are in *pari delicto* where it finds, as for example, both parties to a gambling transaction) an exception is now well established in the situation where the statute which creates the illegality was made for the benefit and protection of a particular group or class of persons. Persons in the group for whose benefit or protection a statute is enacted are not in *pari delicto* with the wrongdoer. Such persons are the protected object of the very statute involved.

The District Court of Appeal of California in the case of *Elmers v. Shapiro*, 91 Cal. App. 2d 741, making this distinction clear, at page 754, used the following pertinent language:

“It is, of course, a general rule that neither party to an illegal transaction may secure the restoration of property or money transferred in the course of the illegal transaction. Such parties are said to be *in pari delicto* and neither may recover from the other. There has always been a judicial aversion to aiding a malefactor in profiting from his own wrong so that in such cases the court will leave such parties where it finds them. But such rules have no application to transactions illegal because in violation of a statute, where such statute is aimed at protecting one of the parties to the transaction. In such cases there is no

parity of *delictum*, and the one protected by the law may, at any time, resort to the law to recover money paid even though the illegal transaction is completed.”

This same rule has been enunciated and followed in the case of *Miller v. Calif. Roof Co.*, 55 Cal. App. 2d 136.

This general rule is not peculiar to California but is a well recognized general rule of law widely followed throughout the United States.

This principle is recognized by the editors of American Jurisprudence. In 12 *Am. Jur. (Contracts, Secs. 217 and 218)*, page 735, the following statement is found:

“Where the law that creates the illegality in the transaction was designed for the coercion of one party and the protection of the other or where the one party is the principal offender and the other criminal only from a constrained acquiescence in the illegal conduct, in such cases there is no parity of *delictum* at all between the parties, and the one protected by the law or acting under compulsion may, at any time, resort to the law to recover money paid, *though the illegal transaction is completed*.

.

Hence, where the parties are not in *pari delicto*, actions are sustained to recover back the money or other consideration received for such obligations, though the obligations themselves, being against law, cannot be sued on.”

It should be noted that under the California contractors law no penalty is imposed upon one dealing with an unlicensed contractor.

The contract between the plaintiff and defendants for the performance of contracting services by defendants was

wholly void because the defendants did not hold the required license to perform the services contracted for. Likewise the contractor's licensing statutes were enacted for the protection of the public in dealing with persons holding themselves out as being qualified to render services requiring particular skills. The plaintiff was one of the group which was sought to be protected by the Contractor's Licensing Statutes, and is therefore under the law not in *pari delicto* with the defendants.

Were this exception not so well recognized in the law, the position of the trial court in denying the plaintiff the relief it sought might be justified. The plaintiff was one of the very class of persons sought to be protected by the contractor's license law.

The California Contractor's License Law as embodied in the Business and Professions Code, which are hereinabove set forth are statutes made for the protection of the public. The statutes were enacted to protect the public including this plaintiff from being imposed upon by persons who did not demonstrate to the licensing authorities their ability and qualifications to perform the service which they offered to perform. The Supreme Court of California so expressly held in *Loving & Evans v. Blick*, 33 Cal. 2d 603, and also in *Franklin v. Goldstone*, 33 Cal. 2d 628.

The final question therefore presented by this appeal is whether or not under the California law the plaintiff who is one of a protected class and who is not in *pari delicto* with the defendants is prevented from recovery of money paid under a void contract because the payment was volun-

tarily made. We respectfully urge that the Supreme Court of California has decided this question in the negative.

The Supreme Court of California in the case of *Miller v. McKinnon*, 20 Cal. 2d at page 89, in reversing the judgment for the defendant after the Trial Court had sustained a demurrer to the plaintiff's complaint for recovery of money paid under a void contract, used the following language:

"With the principles being as above stated, it inescapably follows that a right of action exists to recover moneys paid to a contractor for work and materials furnished the public agency where they were furnished in contravention of a statute requiring competitive bidding. *If, as we have seen, the contract is absolutely void as being in excess of the agency's power, the contractor acts at his peril, and he cannot recover payment for the work performed, it necessarily follows that any payments made to him for the work are illegally made and may be recovered.*" (Italics ours.)

The following pertinent language is also found in the same case at page 88 of the opinion:

"And even though the person with whom the contract was made has supplied labor and materials in the performance of the contract and the public agency has received the benefits thereof, he has no right of action to recover in *quantum meruit* the reasonable value thereof. (*Reams v. Cooley, supra; Zottman v. San Francisco, supra; Gamewell F. A. T. Co. v. Los Angeles, supra.*)"

The value, if any, of the defendants' services rendered to the plaintiff is not material to the case. The trial court made no finding as to the value of the services of the defendants.

Regardless of what actual benefit the plaintiff received from the illegal services rendered by the defendants, the law does not permit the defendants to offset the value of their illegal services. The law does not recognize any value in services rendered by one licensed to give such services, just as a lay person attempting to give legal advice may not be heard to say that the advice given by him was good legal advice.

The fact that plaintiff made voluntary payment or even received some value as a result of defendants' services under the void contract does not afford ground for denying the relief plaintiff seeks. The District Court of Appeal in *Miller v. City of Martinez*, 28 Cal. App. 2d 364, commencing at page 370, used the following language:

"It is contended that the purchase price of the goods cannot be recovered without an offer to return them. The contention is devoid of merit. It is directly answered in the following language taken from the case of *County of Shasta v. Moody*, 90 Cal. App. 519, 523, 524, 265 Pac. 1032: 'Appellant strenuously contends that the county is estopped from maintaining this action without first restoring, or offering to restore, to him the benefits received from the job work, printing, advertising, etc. There is no merit in this contention. *The contracts being void under the express provisions of the statute, and also being*

against public policy, there is no ground for any equitable considerations, presumptions or estoppels. (*Berka v. Woodward*, 125 Cal. 119, 128, 57 Pac. 777, 73 Am. St. Rep. 31, 45 L. R. A. 420; *Stockton Plumbing & Supply Co. v. Wheeler*, 68 Cal. App. 592, 229 Pac. 1020; *Nielson v. Richard*, 75 Cal. App. 680, 243 Pac. 697; 21 Cal. Jur. 888.) . . .

“The contracts in the case at bar, as we have seen, are against the express prohibition of the law and courts will not entertain any rights growing out of such a contract, or permit a recovery upon a quantum meruit or quantum valebat. (*Berka v. Woodward, supra.*)” (Italics ours.)

In *Brooks v. Brooks*, 48 Cal. App. 2d 347, at page 351, the Court used the following pertinent language:

“It is likewise settled that, where a party pays a consideration pursuant to the terms of a void agreement, he may immediately sue to recover the amount of such payments where, as in the instant case, the parties are not *in pari delicto* (*Smith v. Bach*, 53 Cal. App. 63, 64 (199 Pac. 1106); *McAllister v. Drapeau*, 14 Cal. 2d 102, 112, 92 Pac. 2d 911, 125 A. L. R. 800; *Restatement of the Law of Contracts* (1932), Vol. II, p. 1120, sec. 604.)”

Where the contract is void and the plaintiff is not in *pari delicto* with the defendant, recovery is proper under a complaint sounding in common count for money had and received.

Baer v. Tippet, 34 Cal. App. 2d 33;

Randall v. Cal. L. B. Syn., 217 Cal. 597.

Conclusion.

It is therefore respectfully submitted that the Trial Court erred in rendering judgment in favor of the defendants on the basis of the facts found by the court in this case. This is true because the contract for services rendered by unlicensed defendants to the plaintiff was wholly void under California law by reason of defendants' failure to possess the required license. Likewise the law is well established that the consideration paid under a wholly void contract is properly recoverable unless the plaintiff is in *pari delicto* with the defendants. This case falls squarely within the established rule of law that plaintiff is not in *pari delicto* with the defendants. Likewise the law is well established that where plaintiff is not in *pari delicto* with the defendants, a voluntary payment does not constitute a bar or estoppel.

It is respectfully submitted therefore that judgment should be reversed and the Trial Court directed to enter judgment in favor of the plaintiff.

Respectfully submitted,

MAURICE J. HINDIN,

Attorney for Appellant.

No. 13017

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

COMET THEATRE ENTERPRISES, INC.,

Appellant,

vs.

LEON CARTWRIGHT, WILLIAM E. WILSON, CARTWRIGHT
& WILSON CONSTRUCTION Co., a Copartnership, and
CARTWRIGHT & WILSON CONSTRUCTION Co., a Corpo-
ration,

Appellees.

APPELLEES' REPLY BRIEF.

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PAUL P. O'BRIEN

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Appellees.

APPELLEES' REPLY BRIEF.

Appellant without relying on any of the testimony taken at the trial seeks a reversal of the trial court's judgment on the sole question as to whether or not as a matter of law a party who has voluntarily made payment to another who is unlicensed, for what appellant chooses to designate as "contracting services" performed by the latter. The Findings of Fact state, "Defendants were employed by plaintiff in connection with the construction of a drive-in theatre in Pasadena, California, in connection with said construction defendant supervised certain of the work, consulted with and furnished certain plans and specifications to plaintiff's architect and arranged for two or more experienced subcontractors to come to Pasadena from Utah to do various parts of the work." It is,

therefore, apparent that appellant's designation that these were contracting services is not borne out since no evidence taken in the trial court is in the record.

Appellant argues, regardless of the foregoing, that it is entitled to recover as a matter of law for a payment voluntarily made for services actually rendered, regardless of the nature of the services rendered by the appellees in connection with the construction of the drive-in theatre. It will be noted that Section 7031 of the Business and Professions Code of the State of California, quoted at length on page 5 of appellant's opening brief, provides that no person engaged in business or acting in the capacity of a contractor may bring an action in any court of this State for compensation for the performance of any act or contract for which a license is required, etc., without proving that he was a duly licensed contractor at all times during the performance of such act or contract which is the civil penalty all unlicensed parties have cast upon them by the law of California. This is not a case where an unlicensed contractor is suing to recover compensation as were the facts in the cases cited in the appellant's opening brief except those cases such as *Elmers v. Shapiro*, 91 Cal. App. 2d 741, which deals with a violation of the Veterans Emergency Housing Act of 1946, 50 U. S. C. A. P., Section 1921 *et seq.* Section 7(d) thereof which is quoted at length on page 749 of the opinion and specifically gives the person who buys such housing accommodations a right to sue for the amount of consideration which exceeds the maximum ceiling price, and *Miller v. California Roof Co.*, 55 Cal. App. 2d 136, which deals with the violation of the Corporate Securities Act.

The case which we think is decisive here, namely, *Holm v. Bramwell*, 20 Cal. App. 2d 332, which case at page 337 (cited in appellant's brief) states,

"There are certain cases in which a recovery may be authorized in spite of an illegal contract, when the action is not founded on the illegal contract, but when on the contrary it is based upon a subsequent legal contract or agreement which may be established without reference to the illegal contract.

"In the present case, the plaintiff clearly is not entitled to recover a lien to secure the repayment of money which he advanced George Collins pursuant to an illegal contract for the reason that this suit is based upon that illegal contract and the claim cannot be established except by reference to the price fixed by the illegal contract. The present case, therefore, does not come within the exception to the general rule, above mentioned.

"The contract between the plaintiff and the subcontractor, Collins, being illegal and void, and the advances alleged to have been paid to Collins are not recoverable in this suit for the reason that they must be deemed to have been voluntarily made. (*Meyers v. City of Calipatria*, 140 Cal. App. 295, 299; *Metropolitan Casualty Insurance Co. v. Stone*, 125 Cal. App. 430, 438.)"

In the *Meyers* case, *supra*, it is said in that record:

"It is the compulsion or coercion under which the party is supposed to act which gives him a right to relief. If he voluntarily pays an illegal demand, knowing it to be illegal, he is of course entitled to no consideration; and if he voluntarily pays such demand in ignorance or misapprehension of the law respecting its validity, he is in no better position, be-

cause it would be against the highest policy for transactions to be opened upon grounds of this character.”

If counsel expects to demonstrate that the parties were not *in pari delicto* with no evidence received at the trial before this court it will indeed take some doing. Without such a showing none of the cases cited have any application to the case at bar.

To demonstrate *ad absurdum* appellant's rationale by citing a ridiculous hypothesis for the sole purpose of emphasis appellant would have this court hold that if one employed another to build a house for him for the sum of \$25,000.00, the house was completed and accepted, the money paid and after living in the house for a year, being perfectly satisfied and intending to keep it, the owner could sue the building contractor for the return of the entire cost of construction because the builder had failed to procure a license and recover the amount paid. The penalty provided in Section 7031, *supra*, is that the unlicensed contractor forfeits his right to maintain an action just as one who does business under a fictitious name forfeits his right to maintain an action under that fictitious name until he has complied with the statutes in such cases made and provided.

Examination of all of plaintiff's authorities will demonstrate that they are not factual in point and are readily distinguishable on legal grounds.

There is no valid basis on which the case should be reversed.

Respectfully submitted,

TRIPP & CALLAWAY,

By HULEN C. CALLAWAY,

Attorneys for Appellees.

No. 13017.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

COMET THEATRE ENTERPRISES, INC.,

Appellant,

vs.

LEON CARTWRIGHT, WILLIAM E. WILSON, CARTWRIGHT
& WILSON CONSTRUCTION Co., a Copartnership, and
CARTWRIGHT & WILSON CONSTRUCTION Co., a Corpo-
ration,

Appellees.

APPELLANT'S REPLY BRIEF.

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No. 13017.

IN THE

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CARTWRIGHT & WILSON CONSTRUCTION Co., a Corpo-
ration,

Appellees.

APPELLANT'S REPLY BRIEF.

Appellees' Reply Brief urges the sustaining of the trial court's judgment for two reasons, the first of which appears to be the Appellees' contention that the defendants were not contractors within the meaning of Sections 7026, 7028, 7030, 7031, 7055, and 7057 of the Business and Professions Code of California. The second contention advanced by the Appellees is based upon the authority of the cases of *Holm v. Bramwell*, 20 Cal. App. 2d 332, and *Meyers v. City of Calipatria*, 140 Cal. App. 295. It is respectfully submitted that both of Appellees' theories for support of this judgment are demonstrably erroneous and inapplicable, for the following reasons:

The Defendants Rendered Services as Contractors Within the Meaning of the Business and Professions Code of California.

The findings of fact signed by the trial court in part read as follows:

“The defendants were employed by the plaintiff in connection with the construction of a drive-in theater in Pasadena, California, in connection with which said construction defendants supervised certain of the work, consulted with and furnished certain plans and specifications to plaintiff’s architect, and arranged for two or more experienced sub-contractors to come to Pasadena from Utah to do various parts of the work.”

Section 7057 of the California Business and Professions Code defines a building contractor as follows:

“A general building contractor is a contractor whose principal contracting business is in connection with any structure built, being built, or to be built for the support, shelter, and enclosure of persons, animals, chattels, or movable property of any kind requiring in its construction the use of more than two unrelated building trades or crafts or to do or superintend the whole or any part thereof.”

Section 7026 of the Business and Professions Code defines a contractor as follows:

“The term contractor for the purposes of this chapter is synonymous with the term ‘builder’ and, within the meaning of this chapter, a contractor is any per-

son, who undertakes to or offers to undertake to or purports to have the capacity to undertake to or submits a bid to, or does himself or by or through others, construct, alter, repair, add to, subtract from, approve, move, wreck or demolish any building, highway, road, railroad, excavation or other structure, project, development or improvement, or to do any part thereof, including the erection of scaffolding or other structures or works in connection therewith. The term contractor includes subcontractor and specialty contractor.”

The trial court found specifically that the agreement between the plaintiff and the defendants was illegal by reason of the fact that the defendants were not licensed as building contractors. The record, we think, is abundantly clear, and the trial court so found, that the services rendered by the defendants were services which required them to have and hold a contractor's license. Appellant respectfully urges that no true question of law exists with reference to the requirement that the defendants be licensed. The only reasonable conclusion to be drawn from the findings of fact and conclusions of law signed by the trial court was that the defendant performed services for which they were required to have and hold a contractor's license. This, of course, they did not hold.

The true question on appeal is whether or not the plaintiff may recover a payment made to such unlicensed defendants.

The Holm and Meyers Cases Do Not Support the Judgment and Are Distinguishable From This Case.

The factual differences between the *Holm v. Bramwell* case and the case on appeal here point up sharply the exception to the general rule that a person cannot recover money paid to another under an illegal contract where both parties are equally guilty or in *pari delicto*. The test as to whether the parties are in *pari delicto* or not turns upon whether or not the statute which forbids the particular conduct was made for the protection of one of the parties. There is no question but that the plaintiff in the case now before this Court was one of the persons protected by the building contractors' licensing statutes. The plaintiff was not required to have a license, but the defendants were so required.

Factually, the case of *Holm v. Bramwell* differs from the case before this Court. The pertinent and distinguishing facts of the *Holm* case are, briefly, as follows: The plaintiff there was a licensed building contractor. The plaintiff secured the services of one Collins, who was to perform subcontracting work under the plaintiff. Collins, the subcontractor, was not licensed. In an action brought by the licensed contractor to foreclose a mechanic's lien against the owner of the property, the licensed contractor sought to include in the amount of his claim the money he voluntarily paid to the unlicensed subcontractor. This the Court did not allow him to do. The Court found that the contract between the licensed con-

tractor and the unlicensed subcontractor was illegal and void, because the subcontractor was unlicensed as required by the California contractors' license law.

In the *Holm* case, the action was by a licensed contractor against the owner of the property to foreclose a mechanic's lien. Unlike the case before this Court, no action was brought by anyone against the unlicensed contractor. In that case the unlicensed subcontractor was not even a party to the action. In short, the question of law presented in the *Holm* case was not that of a plaintiff seeking to recover money he paid to an unlicensed contractor but on the contrary, it was an action by a licensed contractor against the owner of property.

The *Holm* case supports the Appellant's position, since the Court in that case followed the general established rule that an agreement with an unlicensed contractor is wholly void.

As between a licensed contractor and an owner of property, the Court in the *Holm* case properly held that the licensed contractor could not recover for money he paid voluntarily to an unlicensed subcontractor. This was true because the conduct of the licensed contractor in attempting to charge the landowner with the amount of money paid to an unlicensed person would in effect circumvent the rule of law that the agreement between a party and an unlicensed person is wholly void. The Court properly reasoned that such payments made by the general contractor to the unlicensed subcontractor were in effect

money he had given away voluntarily, and as such he certainly could not charge the landowner therefor.

The holding in the *Holm v. Bramwell* case, relied upon by the Appellee, is entirely consistent with the position of the Appellant on this appeal. The absolute invalidity of the agreement for contracting services between a person and an unlicensed person is clearly enunciated by the Court in this case. It was not a case, however, where the person who was protected by the statute sought to recover money paid to an unlicensed contractor. That case is not controlling here and is not even close factually or in theory to the case on appeal here.

The case of *Meyers v. City of Calipatria*, cited by Appellees, is not comparable factually with the case on appeal here, nor are the legal questions therein involved present in the case on appeal here.

That case recognized the general rule that a person cannot recover money paid by him under an illegal contract where both parties are equally guilty or are in *pari delicto*. The plaintiff in the case on appeal has clearly brought himself within the recognized exception to this rule. The exception is that where a statute is aimed at protecting one of the parties to a transaction, such a party who is in the protected class is not in *pari delicto* as a matter of law with the other party to the transaction. Not only is this rule recognized in California as such, but, as was pointed out in Appellant's opening brief, is recognized throughout the country.

In the case on appeal before this Court, we think it is clear that the plaintiff was within the class of persons sought to be protected by the building contractors' license law. The purpose of the license law was to protect the public in their dealings with contractors whose qualifications had not been submitted to licensing tests and requirements. The defendant contractors in this case did not demonstrate that they had the necessary qualifications to act as contractors by securing the required license. It follows, therefore, as a matter of established law that the plaintiff and the defendants were not equally guilty, but that the plaintiff was in the protected class of persons contemplated by the licensing law.

Conclusion.

It is therefore respectfully submitted that judgment in this case should be reversed.

Respectfully submitted,

MAURICE J. HINDIN,

Attorney for Appellant.

No. 13019

In the
United States Court of Appeals
For the Ninth Circuit

ARNE O. BJORNSON, *Appellant,*

vs.

ALASKA STEAMSHIP COMPANY,
a corporation, *Appellee.*

FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

BRIEF OF APPELLEE

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THE ARGUS PRESS, SEATTLE

FILED

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PAUL P. O'BRIEN,

CLERK

In the
United States Court of Appeals
For the Ninth Circuit

ARNE O. BJORNSON, *Appellant,*
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FROM THE UNITED STATES DISTRICT COURT
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BRIEF OF APPELLEE

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In the
United States Court of Appeals
For the Ninth Circuit

ARNE O. BJORNSON, <div style="text-align: center;">vs.</div> ALASKA STEAMSHIP COMPANY, a corporation,	}	<i>Appellant,</i> <i>Appellee.</i>	} No. 13019
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FROM THE UNITED STATES DISTRICT COURT
 FOR THE WESTERN DISTRICT OF WASHINGTON
 NORTHERN DIVISION

BRIEF OF APPELLEE

QUESTION INVOLVED ON APPEAL

Under Rule 52, Federal Rules of Civil Procedure, should this court disturb the district court's findings as to the extent of damages sustained by appellant in a Jones Act suit, where all the conflicting testimony pertaining thereto, was heard orally by the district judge.

STATEMENT OF CASE

Appellant's damage action originally demanded a jury trial, which appellant waived subsequently (Tr. 6).

At the conclusion of the trial before the court, District Judge Bowen entered appropriate findings of fact and conclusions of law, finding appellant's total damages in the amount of \$1,500.00 but reduced this amount by 50% to \$750.00 because of appellant's con-

tributory negligence (Tr. 14). The original award of damages to appellant in the amount of \$1,500.00 was based upon wages lost by appellant as the result of his injury in the approximate amount of \$1,000.00 and the further sum of \$500.00 for pain and suffering suffered by appellant.

Appellant appeals from the failure of the lower court to make any additional award for alleged permanent partial disability.

ARGUMENT

The legal effect which this court must accord the findings of the trial court based upon oral testimony is prescribed by the following portion of Rule 52, Federal Rules of Civil Procedure, reading as follows:

“Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.”

This rule, which is a restatement of the former federal equity practice, has been repeatedly applied by this court in refusing to disturb the trial court's findings based upon oral but conflicting testimony.

In the case of *Paramount Pest Control Service v. Brewer* (C.C.A. 9) 177 F.(2d) 564, this court said:

“A presumption of the correctness attaches to the findings of the District Court. *United States v. Foster*, 9 Cir., 1941, 123 F.2d 32, and under Rule 52 (a), Federal Rules of Civil Procedure, 28 U.S.C.A., the trial judge's findings of fact will not be set aside unless clearly erroneous. The rule applicable here in the light of the conflicting char-

acter of the evidence in the record before us has been aptly stated in *Federal Savings & Loan Ins. Corp. v. First Nat. Bank, Liberty, Mo.*, 8 Cir., 164 F.2d 929, 932, in this language:

“ ‘We are not at liberty to substitute our judgment for that of the trial court and on appeal that view of the evidence must be taken which is most favorable to the prevailing party, and if, when so viewed, the findings are supported by substantial competent evidence they should be sustained.’ ”

Again in the case of *Pacific Portland Cement Co. v. Food Mach. & Chemical Corp.* (C.C.A. 9) 178 F.(2d) 541, this court said:

“As to this, we are faced with the mandate of Rule 52 (a) of the Federal Rules of Civil Procedure, which bids us not to set aside findings unless they are ‘clearly erroneous.’ Federal Rules of Civil Procedure, Rule 52 (a). Under the interpretation which the Supreme Court, and this and other courts of appeal, have placed upon this section, the findings of a trial judge will not be disturbed if supported by substantial evidence. Full effect will always be given to the opportunity which the trial judge has, denied to us, to observe the witnesses, judge their credibility, and draw inferences from contradictions in the testimony of even the same witness. *Savage v. Lorraine*, 9 Cir. 1945, 148 F.(2d) 818; *Augustine v. Bowles*, 9 Cir. 1945, 149 F.(2d) 93, 96; *Lincoln National Life Ins. Co. v. Mathisen*, 9 Cir., 1945, 150 F.(2d) 292, 295-296. This is the meaning of the provision that findings should not be set aside unless clearly erroneous. *Grace Bros. v. Commissioner*, 9 Cir., 1949, 173 F.(2d) 170, 173-174.”

In the case of *Orvis v. Higgins* (C.C.A. 2d) 180 F.

(2d) 537, Circuit Judge Frank stated the principles governing the reviewing powers of a Circuit Court, under Rule 52, when reviewing oral testimony of a trial court as follows:

“(c) But where the evidence supporting his finding as to any fact issue is entirely oral testimony, we may disturb that finding only in the most unusual circumstances.”

This statement was quoted with approval in the case of *Arnolt Corp. v. Stansen Corp.* (7 C.C.A.) 189 F. (2d) 5.

The mere fact that on the same evidence the appellate court might have reached a different result does not justify it in setting the findings aside. The appellate court does not consider and weigh the evidence *de novo*. *Nee v. Linwood Securities Co.* (C.C.A. 8) 174 F.(2d) 434.

In considering whether the trial court's findings are clearly erroneous, appellees must be given the benefit of all favorable inferences which may reasonably be drawn from the evidence. *Lassiter v. Guy F. Atkinson Co.* (C.C.A. 9) 176 F.(2d) 984.

The rule that the credibility of witnesses is a matter for the sole determination of the trial court is stated as follows in *Federal Practice and Procedure* (Baron and Holtzoff), Vol. 2, Section 1134, page 845, as follows:

“At a trial without a jury the judge determines the credibility of oral testimony of the witnesses and the weight to be given it. An appellate court will not set aside findings of the trial court based upon such evidence.”

NATURE OF APPELLANT'S INJURY

Appellant was injured January 14, 1949, when he fell to the deck of the SS "HAROLD WHITEHEAD," injuring his wrist. His wrist was placed in a cast by the Army Physicians in Yokohama (Tr. 38) and upon his return to the United States was treated by the Seattle Marine Hospital (Tr. 40). He rejoined the vessel April 20, 1949 (Tr. 46), at his regular sea wages of \$195.00 per month plus additional monthly earnings estimated in the vicinity of \$400.00 per month for longshoring and other additional heavy sea duties. Since returning to work he has had no medical treatment nor has he suffered any loss of wage earning capacity.

As is usual in personal injury cases, there was a decided conflict in the medical testimony, which was given orally in the lower court, as to the extent of appellant's injuries. Appellant called three medical witnesses, Dr. Ernest Burgess, Dr. Frederick Exner and Dr. B. E. McConville. Appellant called Dr. H. T. Buckner as its witness.

Dr. Burgess (who admitted he was frequently employed by appellant's counsel to testify for them in personal injury actions) (Tr. 21), was the only physician called by appellant who testified appellant had sustained any permanent partial disability to his wrist as the result of his injury. He thought appellant had sustained a disability estimated by him as 20% of the amputation value of the right elbow (Tr. 21) although all the medical testimony indicated appellant's injury was confined solely to the wrist and the elbow was not involved in the injury.

Dr. Burgess' testimony, based upon his single examination of appellant on June 10, 1950, and made solely for the purpose of testifying in the case, was confusing and vacillating, and obviously partisan. Dr. Burgess stated his examination disclosed there was a crepitus in appellant's wrist (Tr. 17), a twenty-five per cent impairment of gripping power (Tr. 17) and a thickening of the wrist (Tr. 16). None of these alleged findings were substantiated by the other medical witnesses.

On direct examination Dr. Burgess first testified appellant had sustained a fracture of the proximal carpal bones of the wrist (without identifying which of the eight carpal bones he meant) but on cross-examination admitted he could not make such a diagnosis (Tr. 25). Dr. Burgess stated he had initially made this diagnosis because of the alleged condition of "demineralization of the carpal bones" (Tr. 25) shown by the x-rays. He admitted that this condition could likewise be the result of the disuse by appellant of his wrist (Tr. 26). Dr. Burgess was unable to say if appellant had originally sustained a fissure fracture of the end of the right radius, but admitted if such had occurred, it was completely healed (Tr. 24). Dr. Burgess found some impairment in the flexion of appellant's wrist at the time of his examination of June 10, 1950 (Tr. 15).

Dr. McConville found that on March 8, 1950, when he examined appellant at appellant's request, appellant had a slight restriction of wrist flexion of ten per cent (Tr. 107). He stated there was a questionable fissure fracture of the end of the right radius, but it had healed

completely (Tr. 108). Dr. McConville did not testify that appellant had sustained any permanent injury to his wrist.

During the trial, appellant called Dr. Exner, an x-ray expert, to examine the x-ray photographs already in evidence. No shadow box was available so he was obliged to inspect them by holding the plates against the court house window (Tr. 75). Dr. Exner did not corroborate Dr. Burgess' testimony that there was a possible fracture of the carpal bones of appellant's wrist nor any demineralization of those bones. He only found the end of the right radius slightly irregular (Tr. 74) which Dr. Exner stated might possibly be a healed fissure fracture of the radius (Tr. 76). Dr. Exner, like Dr. McConville, did not testify that appellant had sustained any permanent injury to his wrist.

Dr. Buckner, one of the leading orthopedic surgeons in the Northwest, examined appellant on July 31, 1950, at the request of appellee. Dr. Buckner's examination was the most recent of all the examinations. He stated appellant made no complaints of any stiffness of his right wrist and his examination disclosed none (Tr. 59). There was no thickening or crepitus present in appellant's wrist (Tr. 67) in his opinion.

Dr. Buckner had the benefit of comparison of the x-rays he took with those taken March 8, 1950, by Dr. McConville, his office associate. It was Dr. Buckner's opinion appellant had originally sustained a fissure fracture of the right wrist "which is now completely healed and hardly visible" (Tr. 61). Dr. Buckner found no evidence of any fracture of the carpal bones of ap-

pellant's right wrist (Tr. 61) nor evidences of demineralization of those bones (Tr. 61) either on his own x-rays, on those of Dr. McConville or on those of Dr. Burgess, Dr. Buckner stating all three sets of x-rays were identical in appearance (Tr. 67-68).

SUBSTANTIAL EVIDENCE APPELLANT SUFFERED NO PERMANENT WRIST DISABILITY

On direct examination, Dr. Buckner stated, "I thought he made a complete recovery" (Tr. 64).

On cross-examination, he further testified:

"Q. Your testimony is this man has no residual disability whatsoever?

A. I think he has made a very good recovery.

Q. Would you answer the question, please?

A. Yes.

Q. In your opinion, this man has absolutely no residual disability whatsoever?

A. In my opinion he hasn't." (Tr. 68, 69)

The evidence presented a conflict between the opinions of Dr. Burgess and Dr. Buckner as to whether appellant had made a complete recovery from his injury. The credibility of these conflicting witnesses was required to be resolved by the trial court, who stated he did not believe Dr. Burgess' testimony (Tr. 121).

In summarizing his conclusions as to the medical testimony elicited, the trial court said:

"The only thing I would add to the nature and extent of the damages by way of clarification, if any is needed, is that this was a very simple and not a bad bone fracture. So far as the bruising of the tissues is concerned, the Court heard certain

testimony and expert discussion of those possibilities, but the Court was not greatly impressed by any of it. Of course, we all know that when one falls he is likely to sustain some bruising of the cartilaginous material at the end of bones the same as other places, but there is no reason for finding in this case from the discussions of expert witnesses about that point anything unusual or distinctly definite as to the extent of the cartilaginous bruising or trauma or traumatic injury to the covering of the bone ends.

“So far as the fracture is concerned, it might be described as the beginning of a fracture. There was nothing displaced and it was nothing more than a crack in the bone with no displacement whatever and no serious consequences so far as healing of the fracture is concerned, so I wish just a simple form of finding presented carrying into effect that situation.” (Tr. 119-120)

In so evaluating Dr. Burgess' testimony, the trial court was heavily reinforced by the record which showed that Dr. Burgess' opinion in many important particulars was not only not corroborated by the other medical witnesses but in certain instances, flatly contradicted by them. The trial court correctly concluded that the weight of the evidence and inferences therefrom established that appellant had sustained a minor (fissure) fracture of the end of the right radius, from which he had recovered as testified to by Dr. Buckner and as confirmed by the record facts of the short duration of appellant's disability, his return to continuous heavy sea employment at remarkably high wages, and the minimal medical treatment required.

The trial judge, as the trier of the fact and of the credibility of the witnesses whom he heard, had the right to disbelieve them or any of them because of the manner in which he testified, the character of his testimony or because of contradictory testimony.

Certain testimonial evaluation intangibles, not reflected in the cold record, inhere in the trial court's determination of the credibility of witnesses. The demeanor of the witness on the stand, his frankness, the tone of his voice and the rove of his eye often furnish valuable but unrecorded clues to the veracity of the witness.

For this reason Rule 52 enjoins "due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses," an opportunity denied an appellate court.

Since appellant voluntarily waived a jury trial and elected to have the case tried to the court, it comes with especial ill grace for him to indulge in certain insinuations in his brief reflecting on the fairness of the able trial judge in appraising the testimony introduced at the trial. In asking this court to disregard Rule 52 and weigh the evidence *de novo*, appellant is indulging in a frivolous appeal.

CONCLUSION

Since the trial court's findings that appellant had not sustained a permanent injury to his wrist is not clearly erroneous and is supported by substantial record evidence, we submit the findings of fact, conclusions of law and the judgment of the lower court should be affirmed.

Respectfully submitted,

BOGLE, BOGLE & GATES

EDWARD S. FRANKLIN

Attorneys for Appellee

No. 13020

United States
Court of Appeals
for the Ninth Circuit

LEONA SIMPSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record
FILED

OCT 11 1951

Appeal from the District Court for the District of Alaska,
Fourth Judicial Division

PAUL R. O'BRIEN
CLERK

No. 13020

United States
Court of Appeals
for the Ninth Circuit

LEONA SIMPSON,

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Appellee.

Transcript of Record

Appeal from the District Court for the District of Alaska,
Fourth Judicial Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

Attorneys for Plaintiff and Appellee:

EVERETT W. HEPP,

United States Attorney,
Fairbanks, Alaska,

HUBERT A. GILBERT,

Asst. United States Attorney,
Fairbanks, Alaska.

Attorneys for Defendant and Appellant:

WARREN A. TAYLOR,

Fairbanks, Alaska,

WILLIAM V. BOGGESS,

Fairbanks, Alaska.

In the District Court for the District of Alaska,
Fourth Judicial Division

No. 1537—Cr.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LEONA SIMPSON,

Defendant.

INFORMATION

The United States Attorney for the Fourth
Judicial Division, Territory of Alaska, charges:

That on the 10th day of February, 1951, in Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, Leona Simpson feloniously possessed and had under her control a narcotic drug, to-wit, heroine, contrary to the provisions of Sections 40-3-2 and 40-3-20 of the Alaska Compiled Laws Annotated, 1949.

Dated at Fairbanks, Alaska, this 26th day of February, 1951.

/s/ EVERETT W. HEPP,

United States Attorney. [1*]

[Endorsed]: Filed February 26, 1951.

* Page numbering appearing at foot of page of original certified Transcript of Record.

[Title of District Court and Cause.]

WAIVER, ARRAIGNMENT, PLEA AND TIME
FOR SETTING FOR TRIAL

The Government was represented by Everett W. Hepp, U. S. Attorney, and Hubert A. Gilbert, Asst. U. S. Attorney; the defendant by Warren A. Taylor.

Upon interrogation by the Court and being properly informed by the Court, the defendant stated that she desired to waive prosecution by Indictment and be prosecuted under an Information which Waiver was accepted and the Information Ordered filed.

The defendant stated that she desired to waive time for Arraignment and desired to be arraigned forthwith. Whereupon, upon being asked if Leona Simpson was her true name, the defendant answered in the affirmative, and the Information was read to her and a true copy of the same handed to her.

The defendant waived time for entering her Plea and stated that she desired to plead forthwith, whereupon, upon being asked if she was Guilty or Not Guilty of the crime charged in the Information, to-wit: possession and control of narcotic drugs, the defendant pled Not Guilty, which plea was accepted and Ordered filed.

The time for setting this cause for trial was set for March 2, 1951.

Entered in Court Journal Feb. 26, 1951. [3]

[Title of District Court and Cause.]

VERDICT No. TWO

We, the Jury, duly empaneled and sworn to try the above entitled cause, do from the law and the evidence therein, find:

(a) That the defendant is not guilty of the crime charged in the information in this case.

(b) That the defendant, Leona Simpson, is guilty of the crime of attempting to commit the crime set forth in the information filed in this cause, to-wit: the crime of feloniously having possession and control of heroine, a narcotic drug, in the Fairbanks Precinct, 4th Division, Territory of Alaska, upon the 10th day of February, 1951.

Done at Fairbanks, Alaska, this 16th day of May, 1951.

/s/ ROBERT J. McCANN,
Foreman.

Entered in Court Journal May 16, 1951. [15]

[Endorsed]: Filed May 16, 1951.

[Title of District Court and Cause.]

MOTION FOR ACQUITTAL AND, IN THE
ALTERNATIVE, FOR A NEW TRIAL

The defendant moves the Court for a judgment of acquittal upon the following grounds:

That the information upon which defendant was tried did not allege a crime the attempt of which is triable and punishable at law.

In the alternative, defendant moves the Court to grant her a new trial for the following reasons:

1. The Court erred in denying defendant's motion for a directed verdict of acquittal made at the close of plaintiff's evidence.

2. The Court erred in denying defendant's motion for a directed verdict of acquittal made at the conclusion of the evidence.

3. The Court erred in admitting testimony to which objections were duly made.

4. The Court erred in giving instructions to the jury on the law of attempt over defendant's objections.

5. The evidence was insufficient to justify the verdict.

6. The verdict was contrary to law.

Dated at Fairbanks, Alaska, this 21st day of May, 1951.

/s/ WILLIAM V. BOGGESS,
WARREN A. TAYLOR,
Attorneys for Defendant.

Acknowledgment of Service attached.

[33]

[Endorsed]: Filed May 21, 1951.

[Title of District Court and Cause.]

ORDER DENYING MOTIONS

The Court having on June 1, 1951, heard arguments on the defendant's Motion for an Acquittal in this cause or, in the alternative, Motion for a New Trial, and now being fully advised in the premises, it was Ordered that both motions be denied.

Entered in Court Journal June 6, 1951. [35]

[Title of District Court and Cause.]

MOTION FOR A NEW TRIAL

Comes Now, the above named Defendant, by Warren A. Taylor, of her Attorneys, and moves this Honorable Court for an order setting aside the verdict on the above entitled cause, and for a new trial of said cause upon the following grounds, to-wit:

1. Newly discovered evidence which was not available at the trial of said cause, and which has been discovered since the said trial.

This Motion is based upon the Affidavit of Leona Simpson and the exhibit attached thereto.

Dated this 8th day of June, 1951.

/s/ WARREN A. TAYLOR,
Of Attorneys for Defendant.

Acknowledgment of Service attached. [36]

AFFIDAVIT

United States of America,
Territory of Alaska—ss.

Leona Simpson, being first duly sworn, on her oath, deposes and says: That she is the Defendant in the above-entitled cause, and makes this Affidavit for the purpose of securing a new trial of the said cause.

That, on or about the 21st of May, 1951, she received a letter which was post-marked at Seattle, Washington, which post-mark bore the date of May 19th, 1951, of which the original of said letter and envelope is attached hereto and made a part of this Affidavit.

That, this letter was received after the trial of said cause and that same was not available as evidence at the said trial, and affiant believes and avers that if said letter had been received prior to the trial, and had been available therefor, that the said verdict would have been favorable to this defendant.

/s/ LEONA SIMPSON,
Defendant.

Subscribed and sworn to before me this 8th day of June, 1951.

[Seal] /s/ WARREN A. TAYLOR,
Notary Public for Alaska.

My Commission expires 8-11-51.

[37]

[Canceled Stamp]: Seattle May 19 9 PM 1951
Wash.

Air Mail

Leona Simpson
Fairbanks
Alaska

Seattle, Wash., Gen. Del.

Dear Leona:

I'm sorry that you had to take the rap for the box
you got from the Pan Am for me.

Had to beat it when I heard about it. But will try
to make it up to you some day some way.

/s/ Juanita

[Endorsed]: Filed June 8, 1951.

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR NEW TRIAL

The Government was represented by Hubert A. Gilbert, Asst. U. S. Attorney, the defendant was present in person and represented by Warren A. Taylor.

Respective counsels had argument on the defendants second Motion for a New Trial because of the discovery of new evidence.

It was Ordered that the motion be denied.

Entered in Court Journal June 8, 1951.

[39]

[Title of District Court and Cause.]

SENTENCE

The Government was represented by Hubert A. Gilbert, Asst. U. S. Attorney; the defendant was present in person and represented by Warren A. Taylor.

Mr. Taylor announced that the defendant was ready for sentence to be passed on her.

Respective counsel presented statements to the Court. The defendant waived any statement.

It was the Sentence of the Court that the defendant be confined in the Women's Correctional Institution at Alderson, West Virginia, for the period of two (2) years.

The defendant was remanded to the custody of the U. S. Marshal.

Entered in Court Journal June 11, 1951. [40]

In the District Court for the District of Alaska,
Fourth Judicial Division

No. 1537—Cr.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LEONA SIMPSON,

Defendant.

JUDGMENT AND COMMITMENT

On the 11th day of June, 1951, came the United States Attorney, and the defendant, Leona Simpson, appeared in person and by counsel.

It Is Adjudged that the defendant has been convicted on a verdict of guilty of the crime of attempting to feloniously possess and have under her control narcotic drugs, to-wit, Heroin, committed in the Fourth Judicial Division, Territory of Alaska, on the 10th day of February, 1951; and the defendant having been asked whether she had anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court:

It Is Ordered and Adjudged:

That the defendant is guilty of the crime of attempting to feloniously possess and have under her control a narcotic drug, and that said defendant shall be confined in the Federal Reformatory for Women at Alderson, West Virginia, for a period of Two (2)

years, such sentence to commence on the 11th day of June, 1951.

It Is Ordered that the Clerk deliver a certified copy of this Judgment and Commitment to the United States Marshal, or other qualified officer, and that the same shall serve as the commitment herein, and that said defendant pay the costs of this action in the sum of \$., to be taxed by the Clerk of the Court.

Done at Fairbanks, Alaska, this 11th day of June, 1951.

/s/ HARRY E. PRATT,
District Judge.

Entered in Court Journal June 11, 1951. [41]

[Endorsed]: Filed June 11, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

The name and address of appellant is Leona Simpson, 642 Fourth Avenue, Fairbanks, Alaska.

The names and addresses of appellants' attorneys are Warren A. Taylor and William V. Boggess, P.O. Box 200, Fairbanks, Alaska.

The appellant was charged with the felonious possession and control of a narcotic drug contrary to the provisions of Sections 40-3-2 and 40-3-20 of the

Alaska Compiled Laws Annotated, 1949, and the jury returned a verdict of guilty of an attempt of the offense charged.

The judgment of the above-entitled Court entered on the 11th day of June, 1951, adjudged that the appellant had been convicted on a verdict of guilty of the crime of feloniously attempting to possess and control a narcotic drug. It was further adjudged that the appellant be sentenced to confinement in the Federal Reformatory for Women at Alderson, West Virginia, for a period of two years.

On the 6th day of June, 1951, the above-entitled Court entered an order denying appellant's Motion for an Acquittal and for a New Trial.

On the 8th day of June, 1951, the above-entitled Court entered an order denying appellant's second Motion for a New Trial. [42]

Leona Simpson, the above-named appellant, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the above-stated judgment and orders.

/s/ WARREN A. TAYLOR,
WILLIAM V. BOGGESS,
Attorneys for Appellant.

Acknowledgment of Service attached.

[Endorsed]: Filed June 11, 1951.

[43]

[Title of District Court and Cause.]

DESIGNATION OF RECORD

To: The Clerk of the District Court for the Territory of Alaska, Fourth Division.

You are hereby requested to prepare, certify and transmit to the Clerk of the United States Court of Appeals for the Ninth Circuit, with reference to the Notice of Appeal heretofore filed by the defendant, Leona Simpson, in the above-entitled cause, the complete record (including this designation) and all the proceedings and evidence in said cause, prepared and transmitted as required by law and by rules of said Court.

/s/ WILLIAM V. BOGGESS,
Of Attorneys for Defendant.

Acknowledgment of Service attached.

[Endorsed]: Filed July 2, 1951.

[48]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John B. Hall, Clerk of the above entitled Court, do hereby certify that the following list comprises all proceedings as per Designation of Record by Appellants in the above entitled cause, viz.:

1. Information.
2. Order re Information.
3. Waiver, Arraignment, Plea and Setting for Trial.

4. Order Setting Cause for Trial.
5. Praeceptum of United States.
6. Subpoena for Government Witness.
7. Order Resetting Trial of Cause.
8. Order Resetting Trial of Cause.
9. Praeceptum of United States.
10. Stipulation re Venire of Jurors.
11. Trial by Jury.
12. Verdict.
13. Order for Meals for Jurors.
14. Instructions to the Jury.
15. Appearance of Co-counsel for Defendant.
16. Motion of Acquittal, etc.
17. Hearing on above Motion.
18. Order Denying above Motion for Acquittal,
etc.
19. Motion for New Trial.
20. Order Denying Motion for New Trial.
21. Sentence.
22. Judgment and Commitment.
23. Notice of Appeal.
24. Appeal Bond.
25. Cost Bill.
26. Designation of Record.
27. Transcript of Proceedings at Trial.
28. Exhibits, including the narcotic Heroin, sent
under separate cover by registered mail.

Witness my hand and the seal of the above entitled Court, this 18th day of July, 1951.

[Seal] /s/ JOHN B. HALL,
Clerk of the District Court, Fourth Judicial Division,
Territory of Alaska.

In the District Court for the District of Alaska,
Fourth Judicial Division

No. 1537—Cr.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LEONA SIMPSON,

Defendant.

Appearances:

Everett W. Hepp, United States Attorney, of
Fairbanks, Alaska; Hubert A. Gilbert, Asst.
United States Attorney, of Fairbanks, Alaska,
Attorneys for Plaintiff.

Warren A. Taylor, of Fairbanks, Alaska; Wil-
liam V. Boggess, of Fairbanks, Alaska, Attor-
neys for Defendant.

TRANSCRIPT OF RECORD

Be It Remembered, that upon the 14th day of
May, 1951, at the hour of 10 o'clock a.m., the trial of
the above named cause came on regularly for hear-
ing, the defendant being in court in person and rep-
resented by counsel, the Honorable Harry E. Pratt,
District Judge, presiding:

The Court: Call the roll of the jury.

(Whereupon, the Clerk of the Court pro-
ceeded to call the roll.) [1*]

* Page numbering appearing at foot of page of original certified
Reporter's Transcript.

The Court: Counsel wish the panel brought up to 24 or are you willing to go ahead with these 21?

Mr. Hepp: The government is ready to proceed with the jurors that we have.

Mr. Taylor: Can I confer with my client just a moment, your Honor.

The Court: Yes.

(Mr. Taylor conferred with the defendant.)

Mr. Taylor: We are willing to go ahead with the venire that are here now.

The Court: Very well then. This is the time set for trial in the case of United States against Leona Simpson. Parties ready?

Mr. Hepp: Government's ready, your Honor.

Mr. Taylor: Defendant's ready, your Honor.

The Court: Names of the jurors in the box.

The Clerk of Court: Box is full, your Honor.

(Mr. Hepp made a short opening statement to the venire.) [2]

(Mr. Hepp examined the jurors.)

(Mr. Taylor examined the jurors.)

(A jury was duly empaneled and sworn.)

Mr. Hepp: I wonder if we can have a few minutes recess, your Honor?

The Court: We are going to adjourn in a moment and the jurors not chosen and in the box here are excused from the panel. We will take a 10 minute recess.

(At this time, a recess was taken and thereafter the trial of this cause was resumed.)

The Court: Counsel stipulate all members of the jury are present?

Mr. Taylor: Yes, your Honor.

Mr. Hepp: We will, your Honor.

The Court: Very well, proceed.

(At this time, Mr. Hepp made an opening statement to the court and jury.)

Mr. Taylor: The defendant waives a statement, your Honor, at this time.

The Court: Call your witness.

Mr. Hepp: Power Greer, please.

POWER G. GREER,

called as a witness in behalf of the Plaintiff, having been first duly sworn, testified as follows: [3]

Direct Examination

By Mr. Hepp:

Q. Would you state your name to the jury please? A. Power G. Greer.

Q. By whom are you employed?

A. United States Treasury Department.

Q. What are your duties as a treasury agent?

A. Well, I am generally known as a general treasury enforcement agent and in such capacity, I have the enforcement of the—all treasury agencies. There are five. The alcohol tax unit and the intelligence unit which are embraced in the Bureau of Internal Revenue, the United States Custom Service, the Secret Service and the Bureau of Narcotics.

Q. Where is your headquarters, Mr. Greer?

A. In Anchorage.

(Testimony of Power G. Greer.)

Q. How long have you been with the treasury service, Mr. Greer? A. 20 years.

Q. Sir? A. 20 years.

Q. Do you know the defendant, Leona Simpson?

A. Yes, sir.

Q. Calling your attention to February 9th of this year—just yes or no please to this—did you have occasion to go to the Pan American office on any matter which at that time [4] or later concerned this defendant? A. Yes.

Q. What time of the day did you go there, Mr. Greer?

A. It was approximately 12:30 p.m.

Q. Would you state what you did when you arrived at the office?

A. When I first arrived there, I waited a few moments for the return of Mr. Harris who I was informed was in charge of the office. When Mr. Harris appeared, I identified myself, showed him my credentials and told him who I was and stated the purpose of my visit which was that—(Interrupted)

Mr. Taylor: Just a moment. I think you have answered the question. I object to any volunteer statements, your Honor.

The Court: Objection sustained.

Q. (By Mr. Hepp): While at the Pan American office, Mr. Greer, was your attention attracted to any package? A. Yes, sir.

Q. Do you know to whom that package was addressed?

Mr. Taylor: Your Honor—just a moment, Mr.

(Testimony of Power G. Greer.)

Greer. I am going to object until it is shown as to what connection this defendant—this witness went to the Pan American Airways in regard to the defendant. He said he went there in regard to the defendant but I believe it [5] isn't properly established how the defendant was connected with the Pan American Airways.

Mr. Hepp: Your Honor, I would like to ask for a conditional entry of this testimony then.

The Court: Yes.

Mr. Hepp: I can come forward with proof, if necessary. I think it is rather awkward to start in the middle of a matter——

The Court: The connection will be shown? Objection overruled.

Mr. Hepp: Would you read the question, Mr. Reporter?

(The last question was read to the witness as follows:

“Q. Do you know to whom that package was addressed?”)

Witness: Yes.

Q. (By Mr. Hepp): To whom was it addressed?

A. Mrs. Juanita Pearson.

Q. Do you know or were you able to learn where that package came from?

A. Only from what was on the address on the package.

Q. What did you do concerning the package, Mr. Greer?

A. I examined it——

Mr. Taylor: Just a moment, your [6] Honor. I

(Testimony of Power G. Greer.)

am going to object to any questions in regard to this package until the package is identified and brought into court.

The Court: Objection overruled.

Q. (By Mr. Hepp): Would you answer the question? You did answer it, didn't you?

A. Yes, sir. I examined it.

Q. You examined it? What size package was it?

A. It was a pasteboard box approximately six by six inches.

Q. And how was it wrapped, if it was wrapped?

A. It was wrapped in brown wrapping paper.

Q. Mr. Greer—

Mr. Hepp: I would like to mark this for identification, Mr. Clerk.

Clerk of Court: Government's identification number one.

(At this time, a paste board box was received and marked for identification as Plaintiff's Identification No. 1.)

Q. (By Mr. Hepp): Mr. Greer, I show you government's identification number one which appears to be a paste board box with packing—a packing compound in it. I will give you that and ask [7] you to examine it please. State if you know what it is, Mr. Greer, please.

A. This is the package that I examined at the cargo office.

Q. I see. Do you know where the wrapper is that you have testified concerning?

A. Yes, sir.

(Testimony of Power G. Greer.)

Q. Where is it, sir? A. I have it.

Q. Would you produce it please?

(Document handed to Mr. Hepp by witness.)

Mr. Hepp: Would you mark this for identification, Mr. Clerk?

Clerk of Court: Government's identification number two.

(At this time, a piece of brown wrapping paper was received for identification and marked as Government's Identification No. 2.)

Q. (By Mr. Hepp): I have here government's identification number 2, Mr. Greer, which you stated was the wrapper. I will ask you to examine it again. Is that the wrapper that you stated that you——

A. Yes, sir; it is.

Q. That was the wrapper that was around this box? [8] A. It was.

Q. Does that wrapper contain an addressee or a consignee, Mr. Greer? A. It does.

Q. To whom is it addressed?

A. It is addressed to Mrs. Juanita Pearson, Fairbanks, Alaska.

Q. From whom did—was the package sent if it states on the——

A. It states from Miss Earlenne Pearson, 16327, southwest 43rd Street, Seattle, Washington.

Q. Now, going back to this package or rather the contents in it, did you say you examined this package? A. I did.

Q. Did you examine the contents in it.?

A. I did.

Q. What did you find?

(Testimony of Power G. Greer.)

A. The first thing I found other than the paper was a wooden box, a wooden powder box which was empty and below another layer of paper I found a white envelope that was sealed with scotch tape. I opened this envelope and found some powder.

Q. Just yes or no—did you do any act endeavoring to ascertain what that powder was?

A. Yes. [9]

Q. When did this occur?

A. Approximately one hour later.

Q. What did you do in that regard, Mr. Greer?

A. I took it to the chemical laboratory, Ladd Air Force Base and there requested Dr. Bowden to make an analysis of it.

Q. Did you—would you just explain the manner in which you gave him the powder? I mean, how did that happen?

A. I showed him the entire contents—rather, the white envelope and asked him how much he would need in order to make the analysis and he stated a very very small amount. He took a very minute amount of it, I would say less than a grain—probably half a grain—and retained it.

Q. In order to enable these jurors who—some of whom may not understand the equivalent weights, what is a grain in comparison for instance to a teaspoonful?

A. That would be hard to say.

Q. Roughly?

Mr. Taylor: Just a moment, your Honor, I object to the question. It calls for a conclusion of the witness.

The Court: Objection overruled.

(Testimony of Power G. Greer.)

Witness: I could probably better compare it this way, sir, that there are 420 grains in an ounce, avoirdupois weight. [10]

Q. (By Mr. Hepp): You say there was one or less grains removed from this by this chemist?

A. Yes, sir.

Q. What did you do with the balance of the powder? A. I retained it in my custody.

Q. Do you have it now?

A. No, sir; I do not.

Q. What did you do with it?

Mr. Taylor: Just a moment, your Honor. I think that the powder is the best evidence, your Honor.

The Court: Objection overruled.

Witness: The powder on the following day was forwarded under postal registry to our chemist in Seattle, Washington.

Q. (By Mr. Hepp): What is his name please?

A. Mr. Hugo Ringstrom.

Q. Now, getting back to this package in the office, did you have occasion to go back to the Pan American office following this time that you have testified in which you originally saw the package and examined it? A. Yes, sir.

Mr. Taylor: Just a moment, Mr. [11] Greer. We are going to object to the question. There is no time set as to when he first went to the Pan American office or when he took the powder to the chemist. No date has been set.

Mr. Hepp: Your Honor, he said the 9th at 12:30 or 1 o'clock I believe it was.

(Testimony of Power G. Greer.)

The Court: Yes. Objection overruled.

Q. (By Mr. Hepp): When did you return to the Pan American office, Mr. Greer?

A. I returned that afternoon approximately four or five o'clock.

Q. That was on February—the same day——

A. February 9th, yes, sir.

Q. I see. Did you have occasion to return there the next day? A. I did, sir.

Q. What time did you go there?

A. Approximately in—8 o'clock in the morning.

Q. In the morning? Do you know, Mr. Greer, whether or not this package was ever called for?

A. Yes, sir.

Q. Do you know of your own knowledge?

A. Yes, sir; I do. [12]

Q. Was it called for? A. It was.

Q. When was it called for?

A. Approximately 12:15 to 12:20 p.m. on February 10th.

Q. Who called for the package?

A. A cab driver.

Q. Do you know what his name was?

A. Brazell or Brazwell.

Q. Were you present when he called for the package? A. I was.

Q. What, if any, indicia of ownership or right or claim to the package was used in order to claim it?

A. The cab driver produced a note written by hand.

(Testimony of Power G. Greer.)

Mr. Taylor: If the court please, I am going to object to any conversation or any testimony about this note unless the note is produced and identified, best evidence rule.

The Court: Objection overruled.

Q. (By Mr. Hepp): I am not sure that I caught all of your answer, Mr. Greer.

A. The cab driver produced a note written in hand.

Q. There—was there a signature on the note?

A. There was.

Q. Do you know what name purported to be—

Mr. Taylor: Just a moment, Mr. Greer. Your Honor, I am going to renew my objection. I think under the best evidence rule the note itself is the best evidence and this would be under the hearsay rule, your Honor, and I think the absence of it should be certainly explained to the court and no further testimony should be made as to this note.

Mr. Hepp: I am glad to come forward with an offer of proof, your Honor.

The Court: Very well, then. Come forward.

(The following proceedings were had out of the presence and hearing of the jury:)

Mr. Hepp: I will show with this witness and others—two other witnesses—that the note was either misplaced or lost in the residence of the defendant and that if the note is presently possessed by anyone, it would be in the possession of the defendant and that being so irrevocably lost in so

(Testimony of Power G. Greer.)

far as it is the power of the prosecution to produce, I believe that secondary evidence of same is admissible. I will show those things.

The Court: Have you made a demand on the defendant for it?

Mr. Hepp: No, I haven't made a demand. [14]

Mr. Taylor: If they had something in their possession which was material evidence, it either can be construed that it was in favor of the defendant or they are trying to conceal something. It would be prejudicial to allow them to testify as to the contents of this note since they do not have the note and it was material evidence and I don't believe, your Honor——

Mr. Hepp: I don't feel so, not with four witnesses that saw the note and the witnesses are excluded, your Honor. I don't think there could possibly be a travesty on justice in this case. We have no reason necessarily to believe that the defendant has this note. As I say, if it is possessed at this time, it would be in the house there because it was there when the search was made by the treasury agent and he never left the house with the note. He couldn't find it, but he left——

Mr. Taylor: He testified to the note from the taxi driver, your Honor, at the Pan Am office and it would be highly prejudicial.

The Court: The objection will be overruled.

(The following proceedings were had in the presence and hearing of the jury:)

(Testimony of Power G. Greer.)

Mr. Hepp: Mr. Reporter, do you have the last question handy? [15]

(The last question was read as follows:

“Q. Do you know what name purported to be——”

Q. (By Mr. Hepp, continuing): ——purported to be in the signature, if there was one on the note?

A. I do, sir.

Q. What was that name?

A. Mrs. Juanita Pearson.

Q. I believe you stated that this note was in handwriting, was it? A. Yes, sir.

Q. At the time when Mr.—when this cab driver came to the office and produced this note, what did you do then, Mr. Greer?

A. After the cab driver had signed for the package, I made my presence known and identified myself to the cab driver then.

Q. Were you alone at that time or in the company——

A. No, sir. United States Marshal McRoberts was present also.

Q. You say you identified yourself to the cab driver, is that right? A. Yes, sir. [16]

Q. What happened then?

A. I asked to be shown the note and it was shown to me. In fact, I took custody of the note.

Q. What did you do next?

A. I asked the driver from whom he had obtained the note and he told me.

(Testimony of Power G. Greer.)

Q. Did you leave the Pan American office after that or at any time?

A. Yes, sir. I requested the driver to return to the place where he had obtained the note and the driver took the Marshal and I to 642 4th Street.

Q. I see. Would you just state just what happened on your arrival at 642 4th Street?

A. When we arrived and drove up in front of the address and stopped, I noticed two ladies standing in the door. The door was partially ajar. They had just let a dog out the side and we entered the home and I asked the cab driver to point out the lady that had given him the note and he pointed out Leona Simpson. I then presented Leona Simpson the note——

Mr. Taylor: Just a moment, your Honor. I am going to object to any further questioning along this line until it is shown by this witness that they had a valid right to enter the residence of Mrs. Simpson. It was her home and they say they entered into the home. I want to [17] find out just what rights they had to go into the home, your Honor.

Mr. Hepp: Well, I'll go into that, your Honor.

The Court: All right.

Q. (By Mr. Hepp): Going back to when you came to 642 4th Street, what exactly did you do now? That is, did you get out of the car then?

A. Yes, sir.

Q. You got—who got out of the car?

A. All three of us.

(Testimony of Power G. Greer.)

Q. What happened then? Just take it a step at a time, Mr. Greer?

A. I asked the driver if this was the place and he said it was.

Q. Yes. Now, what happened?

A. We all got out of the car and as I stated, the door was partially ajar and two ladies were standing inside.

Q. How far inside?

A. Well, it was partially just inside but within sight—practically up to the front of the door.

Q. I see.

A. They saw us coming and I entered the door and in fact just stood inside the door. I believe the Marshal may have [18] been outside. I am not sure. We were all there together though.

Q. Right at the door?

A. Yes, sir. Some of us—in fact, we all may have been inside. I am not sure about that.

Q. Did you see the defendant at that time?

A. Yes, sir.

Q. Did she make any statement to you that indicated that you weren't trespassing where you were standing? A. She did not.

Mr. Taylor: Just a moment, your Honor. I am going to object to the question as improper—incompetent, irrelevant and immaterial. The entry itself speaks for itself if it was made without the consent of the defendant.

Mr. Hepp: Your Honor, I would very certainly protest that argument. I think anyone has a right

(Testimony of Power G. Greer.)

to go up and talk at the doorstep or inside at the front door. They have a business license to enter there if they come on any type of business and certainly it would shift the burden of exclusion onto the person that did have a possessory right, but your Honor, there is certainly an implied admission by the very nature of the thing. It's done every day, all day.

Mr. Taylor: Can't carry the admissions [19] over to the defendant. He hasn't testified he made a lawful entry.

The Court: Well, it is almost 12 o'clock. We will take an adjournment. There is nothing on during the noon hour, is there, Mr. Clerk?

Clerk of Court: No, there isn't, your Honor.

The Court: We will take an adjournment until two o'clock in a moment.

(At this time, the court duly admonished the jury.)

(The trial of this cause was recessed until two o'clock p.m.)

(At 2 o'clock p.m., the trial of this cause was resumed.)

The Court: Call the roll of the jury.

(Whereupon, the Clerk of the Court proceeded to call the roll.)

Clerk of the Court: They are all present, your Honor.

The Court: Counsel ready to proceed with the trial of this case?

Mr. Hepp: Ready, your Honor. [20]

Mr. Taylor: Ready, your Honor.

The Court: Very well.

(Mr. Power G. Greer resumed the witness stand and continued his testimony under direct examination as follows:)

Mr. Hepp: May it please the court, I think the closing question to this morning's session involved a conversation or a question concerning a conversation——

The Court: Will you read it, Mr. Reporter?

(The last question propounded to the witness was read as follows:)

“Q. Did she make any statement to you that indicated that you weren't trespassing where you were standing?”

The Court: Is there an objection to that?

Mr. Taylor: I believe I did object to that, your Honor. I think the objection was given to the reporter.

The Court: Well, it will be overruled.

Witness: No, she made no reference to anything of that nature. [21]

Q. (By Mr. Hepp): I believe you stated previously that you were standing at or just inside the doorway, is that right, Mr. Greer? A. Yes, sir.

Q. Did you have any conversations with this defendant at that time? Just yes or no please.

A. Yes, sir.

(Testimony of Power G. Greer.)

Q. Who was present at the time?

A. The cab driver, the Marshal, Leona Simpson and a girl by the name of Betty Austin, and myself.

Q. And would you again state the time and the date?

A. It was on February 10th approximately 12:30 at this time.

Q. And this was just at or just inside the doorway of this house? A. Yes, sir.

Q. That would be 642 4th Street?

A. Yes, sir.

Q. What was the conversation, Mr. Greer?

A. After the cab driver had pointed out Leona Simpson as being the party that had given him the note, I had the note in my hand and I showed it to Leona Simpson and I asked her if she had written it. She replied that she had——

Mr. Taylor: Just a moment, your Honor. We are going to object to any further questions about [22] the note unless it—there is some explanation given for its non admission or marked for identification. Under the best evidence rule, the note itself is the best evidence, your Honor. I don't think he can testify to it unless it is shown where the note is.

The Court: Objection will be overruled.

Q. (By Mr. Hepp): You stated that she said that she had written it, is that right? A. Yes, sir.

Q. Where was this note at that time, Mr. Greer?

A. It was in my hand and she was looking at it.

Q. How far away were—from you was she?

A. Standing right next to her.

(Testimony of Power G. Greer.)

Q. Was there anything else said at that conversation following this statement as to whether or not she had written the note? A. Yes, sir.

Q. Would you state what was said following that statement, Mr. Greer?

A. I asked her if she had given it to the driver and she stated she had and I said, "Well, here's your package". She hesitated for several moments and then she finally stated "It isn't my package. I was going to get it and keep it for [23] someone."

Q. Anything else said?

A. Yes, sir. I asked her if she would tell me who the person was that she was to keep it for and she never did reply to that question.

Q. At that—up to that time Mr. Greer, had there been any reference made by anyone as to the contents of that package? A. No, sir.

Q. Had the word "narcotics" or anything—

Mr. Taylor: Just a moment, your Honor. We are going to object to the question as incompetent, irrelevant and immaterial at this time. There is no testimony as to what was in the package at that time or any knowledge that this defendant knew what was in the package.

The Court: Objection overruled.

Q. (By Mr. Hepp): Had there been any statement, Mr. Greer, made—

A. No, there had not.

Q. Was anything else said in that conversation? A. Yes, sir.

(Testimony of Power G. Greer.)

Q. Just continue on with the conversation please?

A. When she made no reply to the question I asked her in reference to who was the owner of the package, I stated, "Well [24] Leona, I am a treasury agent. This package contains approximately \$1,000 worth of illicit heroin".

Mr. Taylor: Just a moment, your Honor. I am going to ask the answer be stricken upon the grounds that the value of that narcotic is a mere conclusion of law and incompetent, irrelevant and immaterial. No showing——

The Court: Objection overruled.

Q. (By Mr. Hepp): Continue on with the statement.

A. I told her that as the package contained approximately \$1,000 worth of illicit heroin, a narcotic, that under the circumstances I would have to arrest her and she would have to come with me to the United States Attorney's office.

Q. Just to go back and catch one point that I am not quite sure I understood. Did you make—before this last statement in which you identified yourself as a narcotics agent, before that moment, I believe you said something about she refusing to identify the person or something.

Mr. Taylor: Just a moment, your Honor. I am going to object to the question as leading and suggestive and prejudicial.

Mr. Hepp: I believe that those very words were

(Testimony of Power G. Greer.)

said by this witness and I just wanted him to elaborate. [25]

Mr. Taylor: This witness did not answer——

Mr. Hepp: I will ask the reporter to read back.

The Court: Objection overruled.

Q. (By Mr. Hepp): Would you answer the question, Mr. Greer? What was said concerning that?

A. Yes, sir. I asked Leona—as I stated when she stated the package wasn't hers and that she was only getting it and keeping it for someone, I asked her to tell me who she was keeping it for and she never has answered the question. To this day, she hasn't answered that question. I gave her several moments to answer the question and when she didn't do it, I said, "Well, Leona, under the circumstances, I will have to place you under arrest," and I identified myself and told her we would have to come to the United States Attorneys office.

Mr. Hepp: Mr. Clerk, would you mark this for identification please?

Clerk of the Court: Plaintiffs' identification number three.

(At this time, a manilla envelope was introduced and marked for identification as Plaintiff's Identification No. 3.) [26]

Q. (By Mr. Hepp): Now Mr. Greer, going back in your testimony to a statement you made that you had sent some white powder to someone, would you state again what you said concerning that?

A. Yes, sir. To elaborate on that, the powder was—stayed in my custody until I returned to Anchor-

(Testimony of Power G. Greer.)

age which was the day or so following for the reason that while I was here, I did not have any of the narcotics sealed folders that we are required to submit the narcotics to the chemist in. When I returned to my office in Anchorage, I placed this in the folder and submitted it to the chemist.

Q. How did you cause this submission?

A. Under registered mail.

Q. I show you plaintiff's identification number 3 which appears to be a brown envelope with post marks on it and ask you to examine it please. (Handed to witness.) State if you know what it is?

A. Yes, sir.

Q. What is it please?

A. This is the official envelope in which the container of heroin was mailed to the chemist.

Q. And again, who mailed it?

A. I did, sir.

Q. And does heroin—is that the same heroin that you removed from this package that you have testified to? [27]

A. It is.

Q. Have you since had that heroin or—in your possession, Mr. Greer?

A. No, sir; I have not.

Q. Have you seen it since you mailed it?

A. No, sir; I have not.

Q. I would like to ask another question or two, Mr. Greer, concerning this note that you have testified to. Do you know where that note is, Mr. Greer?

A. No, sir; I do not.

Q. When did you last see that note?

(Testimony of Power G. Greer.)

A. Last time I saw it was in the home of Leona Simpson when it was folded up and placed under the string that wrapped the package and contained the heroin.

Q. Now, in relation to this—the period of time during which this conversation took place that you have testified to, when did you see that note last in relation to that conversation?

A. Well, it was some few minutes thereafter. I placed the box and the note on the table in the kitchen or the front room of the home after I told Leona that she was under arrest and had to come with us. She stated she had to dress which she did and we were there approximately 30 minutes.

Q. Are you able to explain to this jury what happened to that note? [28]

A. I have an opinion.

Q. No——

Mr. Taylor: We object to an opinion, your Honor.

Mr. Hepp: I will refuse that answer.

Q. (By Mr. Hepp): Of your own knowledge, can you explain where that note is or what became of it? A. No, sir.

Q. Did you make a search about your person or other places for that note before you left the premises of Leona Simpson, Mr. Greer?

A. I did, sir.

Q. Did you find it or any trace of it?

A. No, sir.

Q. And you are presently unable to produce that note? A. No, sir.

(Testimony of Power G. Greer.)

Q. Did you understand the question? I say, you are presently unable to produce that note?

A. That's correct. I do not have it. I don't know where it is.

Q. I believe I will ask you one more question concerning—did you see the note?

A. Yes, sir; I did. [29]

Q. And you saw the writing on it yourself?

A. Yes, sir.

Q. Did you see a name subscribed to that writing?

A. Yes, sir.

Q. What was that name?

A. Mrs.—(pause) I'll get it in a minute. Pearson. (pause) Well, the signature at the bottom of the note was the same that was on the package.

Q. You remember that?

A. Yes, sir.

Q. Well, if you—if that is a recollection of yours, I will ask—show you government's identification number two which was on the package and ask you——

Mr. Taylor: If the court please, we are going to object until that is offered in evidence as to any reference or refreshing his memory, plaintiff's identification two.

The Court: Objection overruled.

Witness: Mrs. Juanita Pearson.

Mr. Hepp: May I have just a moment, your Honor?

The Court: Surely.

Mr. Hepp: (pause) You may question the witness. [30]

(Testimony of Power G. Greer.)

Cross Examination

Q. (By Mr. Taylor): Now Mr. Greer, you were in town on the 9th day of February, 1951?

A. Yes, sir.

Q. How long prior to the 9th of February were you here?

A. If I recall, Mr. Taylor, I came up the first part of the week. I was here several days prior to that date.

Q. Now you testified that you were informed that there was a package at the Pan Am office?

A. Yes, sir.

Q. Who informed you?

A. My information, Mr. Taylor, came by telephone.

Q. Was—who was speaking?

A. He didn't give a name.

Q. And from your—and you went to the Pan Am office then on the afternoon of the 9th of February, is that right? A. Yes, sir.

Q. Now, from the outside of this package, Mr. Greer, was there any indication that it contained narcotics?

A. No, sir; I would say no. The package had been broken on one corner and you could tell partially what was on the inside. That was all.

Q. Well, by partially, what do you mean? You saw some packing in the box? [31]

A. I saw some packing and part of the little wooden box.

Q. And because you saw a little wooden box in

(Testimony of Power G. Greer.)

there, you took that package into your possession, is that right? A. No, sir.

Q. Why did you take it into your possession?

A. I didn't take it into my possession until I examined it and found a narcotic drug was contained therein. Then I took it in my possession.

Q. You are then in the habit of opening up packages being sent through the mails through the Pan Am or other aero carriers?

Mr. Hepp: Just a minute, Mr. Greer. I object to that question as to the habit of law enforcement. I don't think it bears on this particular case. He can ask him any question as to what he did here. I believe that this is irrelevant——

The Court: Objection sustained.

Q. (By Mr. Taylor): Then without—did you have a search warrant to open up the package addressed to somebody else?

Mr. Hepp: I object to that, your Honor. There's nothing in the law or any place else that requires a search warrant to open up a package. I believe a search warrant pertains to a private dwelling house of a person. [32]

The Court: Objection sustained.

Q. (By Mr. Taylor): And you took this package which was addressed to Juanita Pearson and opened it up?

A. What wasn't already opened, yes, sir; I did.

Q. Just what was the condition of that box at the time? Did it have the wrapping paper around it?

(Testimony of Power G. Greer.)

A. Yes, sir; with the exception of this hole or crushed side.

Q. And was the box itself broken?

A. There was a hole in it as I recall. You can look through part of it.

Q. And what did you see when you were looking through that hole?

A. The packing and part of this wooden box.

Q. And you say there was nothing in the wooden box, Mr. Greer?

A. No, sir.

Q. Now, that was about three o'clock on Friday afternoon that you—or during the day between 4 and 5 o'clock in the afternoon, is that right?

A. No, sir.

Q. What time on the 9th?

A. That was approximately 1 p.m.

Q. 1 p.m.? What—and you took the package and took it to [33] Ladd Field?

A. Yes, sir.

Q. Now, after you opened that and gave the chemist at Ladd Field a small amount of the contents, what did you do with the package then?

A. I kept it in my custody.

Q. Did you ever return that package to the Pan Am?

A. Yes, sir.

Q. When did you return it to Pan Am?

A. The next morning.

Q. And when did you take possession of it again?

A. I never turned it over to any representative of the Pan Am.

Q. You kept it in your possession?

(Testimony of Power G. Greer.)

A. I kept it in my possession.

Q. From then until—from one o'clock on Friday until the present time—until you turned it over to the chemist in Seattle?

Mr. Hepp: Just a minute. Your Honor, I believe this deals with this custody or possession or something. I am going to object to this further line of questioning on that matter until counsel defines what he means. There is a lot of difference between custody and possession and I believe that that is a legal term and I am going to object to it until he defines just exactly what he [34] is asking this witness. He has interchanged the words custody and possession and I believe they have a completely different significance in terms of law.

The Court: You can bring it out in the redirect examination if you want. Objection overruled.

Q. (By Mr. Taylor): You may answer.

A. Would you repeat the question?

Mr. Taylor: Will you read the question, Mr. Reporter?

(The question was read to the witness as follows:)

“Q. From then until—from one o'clock on Friday until the present time—until you turned it over to the chemist in Seattle?”

Q. (By Mr. Taylor): You had possession of those contents of that package, is that right?

A. Yes, sir.

Q. And that at the time the taxi driver came to

(Testimony of Power G. Greer.)

the Pan Am Airways, you had the package at that time? A. Yes, sir.

Q. And to whom did the taxi driver deliver the so-called note that you stated he had?

A. He delivered that to Mr. Barnes who was on duty at the [35] cargo office.

Q. And then what did Mr. Barnes do with the note? A. He brought it to me.

Q. And where were you?

A. I was in the back office.

Q. Were you concealed in the back office?

A. I couldn't be seen from where he was standing.

Q. You were concealed then in the back office?

A. Yes, sir.

Q. Now, did you ever make any inquiries as to a Mrs. Juanita Pearson living in Fairbanks?

A. To a certain extent, yes, sir.

Q. And do you know where Mrs. Juanita Pearson is at the present time?

A. Not at the present time.

Q. And when did you first secure possession of this so-called note that you testified about?

A. When Mr. Barnes delivered it to me.

Q. In the back room? A. Yes, sir.

Q. Then what did you do then, Mr. Greer?

A. I took it with the package out to the front and questioned the driver.

Q. And I believe then that you went with him—you testified you went to 642 4th Street? [36]

A. Yes, sir.

(Testimony of Power G. Greer.)

Q. And at the time you got to 642 4th, there was two women standing in the doorway?

A. Yes, sir.

Q. Now, when you entered—you stated you entered the house, you walked into the house. Did you state at the time before you entered that you were an officer? A. I did not.

Q. You just shoved the door back and walked in? A. The door was open.

Q. I mean, did you walk in then without—you said it was partially open in your first testimony?

A. Yes, sir.

Q. Was it wide open to walk in?

A. No, I doubt it. As I recall, it was just partially open and Leona Simpson was standing almost in the doorway.

Q. And you just went and walked right on in then?

A. No, it was right in the doorway that the—I asked the driver which one of the ladies gave him the note and when he pointed out Leona Simpson——

Q. Where were you standing at the time you walked—at the time you asked the taxi driver which one was Leona Simpson?

A. We were right at the doorway. I wouldn't say we were on the inside or the outside. [37]

Q. Now Mr. Greer, how is it you did not ask for Mrs. Pearson?

A. I wasn't looking for Mrs. Pearson particularly.

(Testimony of Power G. Greer.)

Q. Isn't that the name on the box?

A. That's true, but if I had followed the directions on the note, I wouldn't have gone to 642 4th Street.

Q. There was some other directions on this note then besides——

A. There was an address on the note.

Q. What else did you do while you were in Mrs. Simpson's home? A. What next?

Q. What did you do after you talked to her? You say—did you ask her if she was Mrs. Pearson?

A. No, I asked her what her name was.

Q. And so I take it then, Mr. Greer, you did enter her home without her permission?

Mr. Hepp: I am going to object to that question. I don't know that—that word "permission" is very broad. You could have a license or implied permission. I believe our code specifically states that a trespasser is not required to leave until he is so notified and fails to leave and under our codes I believe that the inference is prejudicial and it is unfair. I object to it.

The Court: Objection overruled. [38]

Witness: Will you repeat that question please?

Mr. Taylor: Read it.

(The question was read to the witness as follows:)

"Q. And so I take it then, Mr. Greer, you did enter her home without her permission?"

Witness: I would say I entered her home with-

(Testimony of Power G. Greer.)

out any objection on her part, because she certainly didn't object.

Q. (By Mr. Taylor): Did you ask her whether you could go into the home or not?

A. I did not.

Q. You walked right in then?

A. Yes, sir; after she was identified as being the one that wrote the note.

Q. Now, just what did you do with that note, Mr. Greer, after you got inside?

A. I folded the note up and put it under the string in the package and placed the package on the table.

Q. Now, how many officers were with you at the time? A. Just one.

Q. Who was that?

A. Marshal McRoberts. [39]

Q. And what did you do while you had the package with the note under the string that was there on the table?

A. I kept my eye on Mrs. Simpson.

Q. Who else was there besides the officer, the one officer?

A. The cab driver and the girl named Betty Austin.

Q. Now, you—I believe you stated you attempted to give this package to Mrs. Simpson?

A. I held it out to her and I said, "Here's your package."

Q. And she then stated that it wasn't her package, is that right?

(Testimony of Power G. Greer.)

A. She hesitated several moments.

Q. What do you mean by "several moments"?

A. Well, she looked at it. She did not take it actually in her hands and after hesitating for several moments, she said, "It isn't mine".

Q. Now, how long is several moments. Tell the jury. Just slap your hand once and slap it again when those several moments elapse.

A. That would be hard to judge, Mr. Taylor. It has been several months since it happened.

Q. You want——

A. She didn't take—answer right up and say "It's mine" or "It isn't mine", or this, that or the other. She just hesitated enough so that it was obvious that she was hesitating. [40]

Q. Two seconds.

A. Yes, I would say so.

Q. That is while she was looking at the package?

A. Yes, sir.

Q. And after looking at the package, she says, "It isn't mine"?

A. She kept looking at me and the package and also at the Marshal.

Q. What was Mr. McRoberts doing at that time?

A. He was standing there by me.

Q. Now, Mr. Greer, did you not consider that note as material evidence at the time you got it?

A. I certainly did.

Q. Now, was there anything in that note that would be in favor of Mrs. Simpson?

A. I can't say that there was anything in it. I

(Testimony of Power G. Greer.)

can give you my best recollection as to the contents of the note.

Q. No, we would like to have the note, Mr. Greer.

A. I would too, sir.

Q. What? A. I would, too.

Q. Now, what else did you do at Mrs. Simpson's home?

A. Well, after I discovered that the note was missing, I started looking for it.

Q. Where did you look? [41]

A. Everywhere that I could think of—on my person and I asked Mr. McRoberts if he had it and he looked and said he did not. I asked the cab driver if he had seen it and he said he hadn't.

Q. Did you look any place besides in the kitchen?

A. Yes, I think I did. I looked in the drawers of a night stand table right next to the bed.

Q. You looked in the medicine cabinet in the bathroom? A. Yes, sir.

Q. Looked in the bedroom?

A. In the bedroom.

Q. Did you go through the drawers in the dresser in the bedroom?

A. No, I didn't. I went through the drawers in the little night stand next to the bed.

Q. In other words, you made a search of the premises did you not, Mr. Greer?

A. I did, sir.

Q. And did you have a search warrant to make that search? A. I did not.

(Testimony of Power G. Greer.)

Q. Now Mr. Greer, according to your figures—according to your testimony, there was about 6/7's of an ounce of heroin in that package?

A. Yes, sir, something like that. There was actually 358 grains. [42]

Q. And you say there is 420 grains to an ounce?

A. Yes, sir.

Q. And that would be approximately 6/7's of an ounce, is that right?

A. Yes, sir; something like that.

Q. How do you arrive at that drug—that that drug was of the value of \$1,000?

A. By very simple means, Mr. Taylor. That is a very conservative estimate of it here. Actually, heroin itself is outlawed.

Q. Same as opium and other—

A. No, sir. Opium isn't, but heroin as far as I can remember has—

Q. I just wanted you to answer how you arrived at the value of \$1,000?

A. That's what I am getting at.

Q. Is that the market value?

A. It is not being manufactured at all by reputable drug houses. On the illicit market that's the only way we can arrive at the figures because it is all illicit. On the illicit market in Seattle, it was valued at \$600 by the Bureau of Narcotics. Dope addicts, Mr. Taylor, when they get this heroin, they cut it at least in half.

Q. Had this been cut in half?

A. No, sir; not to my knowledge. [43]

(Testimony of Power G. Greer.)

Q. Why would the value be \$1,000 up here and only \$600 in Seattle?

A. That much difference——

Q. The freight?

A. No, that means differential and that was an estimate before I even weighed it.

Q. Do you remember a conversation in the United States Attorneys office, Mr. Greer, in which I was present and Mr. Hepp, and you stated it was about \$400 worth of heroin in that package?

A. I don't recall that.

Q. You don't recall that? A. No, sir.

Q. I take it then from your testimony, Mr. Greer, at no time can you say that Mrs. Simpson had the actual possession or custody of that narcotic that you seized at the Pan American office?

Mr. Hepp: Now, I object to that as calling for a conclusion of the witness of law. I think that's within the purview of the court to instruct——

Mr. Taylor: Your Honor——

Mr. Hepp: Just a minute, Mr. Taylor—as to what possession in terms of the law implies and what it connotes. I don't think it is a fair question. It calls [44] for a conclusion on the part of this witness and I am going to object to it.

The Court: Objection overruled.

Witness: She had——

Q. (By Mr. Taylor): Just a moment. I say, the actual possession and custody from the time that you got it from the Pan American Airways, did she

(Testimony of Power G. Greer.)

ever have the actual possession and custody of those narcotics?

A. Not physically, no, sir.

Q. What? A. Not physically.

Q. Do you know when that package arrived at the Pan American Airways office in Fairbanks?

A. If I recall, it was on the 7th or 8th. I am not sure about that.

Q. Did you ask Mrs. Simpson if she was Leona—Juanita Pearson? A. I did not.

Q. Now, you mentioned about the signature that was on a mythical note that you have testified to. You said the signature was the same as was on the package. Did you mean that the handwriting was the same or that the name was the same?

A. I meant that the name was the same. [45]

Q. Did you compare the handwriting on the note, the signature, with the address that was on the package?

A. No, sir; I did not.

Q. Mr. Greer, at the time that you searched the premises did you take some money orders and personal correspondence of Mrs. Simpson's?

A. No, sir. I looked at some—not money orders—I looked at some bank drafts, some bank drafts in some bank in California and I asked Mrs. Simpson in reference to them and why the difference in the name and she told me.

Q. And did you not take some of those letters and some of those money order receipts from her home? A. No, sir.

(Testimony of Power G. Greer.)

Q. Did Mr. McRoberts take some of them?

A. Not to my knowledge.

Q. You don't know at the present time whether or not Mr. McRoberts or the District Attorney's office has some of her personal papers and money orders?

A. Not to my knowledge.

Q. Now, are you sure that the name signed to the note Mr. Greer was Juanita Pearson?

A. Mrs. Juanita Pearson.

Q. Mrs. Juanita Pearson, is that right?

A. Yes, sir.

Q. But you had to refresh your memory as to that name from [46] the address that was on the package?

A. I had to refresh my memory as to the first name, yes, sir.

Mr. Taylor: That's all.

Re-Direct Examination

Q. (By Mr. Hepp): Mr. Greer, I believe you—in response to a question by Mr. Taylor, you stated in substance that you had had no search warrant when you searched the premises of 642—that is, the home of Leona Simpson?

A. That's correct.

Q. Was she under arrest at that time?

A. Yes, sir.

Q. Now, one other question. I believe in response to a question by Mr. Taylor as to whether you were concealed in this back office at the Pan American cargo office, did you say you were concealed in that office?

(Testimony of Power G. Greer.)

A. The door was open but actually I was concealed from the counter of the office.

Q. Could you hear the conversation at the business place of the cargo office? A. Yes, sir.

Q. Did you hear the conversation?

A. Yes, sir. [47]

Mr. Hepp: I believe that's all.

Recross Examination

Q. (By Mr. Taylor): Mr. Greer, what stage of the proceeding in the home of Mrs. Simpson was it you told her that she was under arrest?

A. After she failed to identify the person to whom she stated the package was for.

Q. And——

A. She was placed under arrest.

Q. Did you inform her what the charge against her was? A. Yes, sir.

Q. What did you tell her?

A. I told her who I was and what was in the package and that she was—I would have to arrest her for violating the narcotic law.

Q. Then because she did not answer a question, you arrested her as Juanita Pearson?

A. No, I arrested her as Leona Simpson.

Q. Did you advise her of her rights of a person charged with the crime at the time you arrested her?

Mr. Hepp: I object to that question. I do not think it is necessary or incumbent upon a peace officer to advise. That's a magistrate's office.

The Court: Objection sustained. [48]

(Testimony of Power G. Greer.)

Q. (By Mr. Taylor): After she was placed under arrest, where did you take her, Mr. Greer?

A. I didn't take her anywhere. I told her to get her clothes on so she could go to the District Attorney's office.

Q. Uh-huh. Did you go up there?

A. Yes, sir.

Q. And what took place there, Mr. Greer?

A. Well, we didn't go there directly. We went to the Marshal's office, and called the District Attorney and when the District Attorney appeared, she went into his office.

Q. And what took place in the District Attorney's office?

A. She was questioned by the District Attorney.

Q. And what questions were asked of her, Mr. Greer?

A. Well, principally, questions were asked her in reference to the person to whom she was to keep this package for.

Q. And who asked that question?

A. Mr. Hepp.

Q. And what was her response?

A. She stated she didn't care to answer that question.

Q. And did she make a request for an attorney at that time, Mr. Greer?

A. Yes, sir.

Q. And did you attempt at that time to deliver this package to Mrs. Simpson? [49]

A. No, sir.

(Testimony of Power G. Greer.)

Q. What? A. No, sir.

Q. Isn't it a fact, Mr. Greer, that you said, "Here's your package. Do you want to open it up?"

Mr. Hepp: I object. I don't even know what point of time he is talking about, whether he is down there at her residence or up in the District Attorney's office.

Mr. Taylor: Counsel should pay attention and know that we are talking about the conference up in his own office.

Mr. Hepp: I don't believe that is a fair question. I couldn't identify it and I was there and I never heard anything said about a package. I assumed he is talking about——

Mr. Taylor: I am just asking if there was.

The Court: Objection will be overruled.

Witness: No, sir, the package wasn't given to her or even attempted to be given to her.

Q. (By Mr. Taylor): Well, was there such an attempt to give her the package, to open it up in the Marshal's office? [50]

A. No, sir. I opened the package in the Marshal's office myself and showed her the contents.

Q. In her presence? A. Yes, sir.

Q. Isn't it a fact, Mr. Greer, that you did offer her the package at that time?

A. I don't recall that I did.

Q. You might have though?

Mr. Hepp: I object to that, your Honor, calling for pure speculation.

(Testimony of Power G. Greer.)

The Court: Objection sustained.

Q. (By Mr. Taylor): Well, I will ask you one more question, Mr. Greer. Isn't it a fact that you asked Mrs. Simpson to open that package in the Marshal's office?

A. No. I say I don't recall that I did ask her that.

Mr. Taylor: That's all.

Q. (By Mr. Hepp): Just one moment, Mr. Greer. Now, Mr. Greer, you have purported—in response to Mr. Taylor's question—to cover some of the conversation that was in the District Attorney's office. I would like to ask you if at any time when she was in the District Attorney's office if she was advised of her right to counsel and she didn't have to make any statement? [51]

A. Yes, sir; that was the first thing you told her.

Q. (By Mr. Taylor): But it wasn't the first thing after the arrest, though?

Mr. Hepp: I object to that, your Honor. Counsel knows that has been ruled on. I think he should be admonished for bringing that up.

The Court: Objection sustained.

Mr. Taylor: That's all.

(At this time, Mr. Power G. Greer left the witness stand.)

Mr. Hepp: Ted McRoberts, please.

THEODORE R. McROBERTS

called as a witness in behalf of the Plaintiff, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Hepp): Would you state your name to the jury, sir?

A. Theodore R. McRoberts, known as Ted.

Q. By whom are you employed?

A. Well, Department of Justice, Marshal's office.

Q. Do you know Power Greer?

A. Yes, I do.

Q. Do you know the defendant, Leona Simpson?

A. When I see her. [52]

Q. Were you so employed by the Department of Justice on the 10th day of February of this year?

A. I was.

Q. Did you see Power Greer at any time during that day? A. I did.

Q. Where did you see him?

A. I saw Power Greer in the Pan American office.

Q. I assume by your answer that you were there then?

A. He called me up at the Marshal's office and asked me to come down.

Q. Did you go down there?

A. I did, somewhere around about 10:30.

Q. Was your attention at any time while at the Pan American office attracted to a package that Mr. Greer had entertained an interest in?

A. It was.

(Testimony of Theodore R. McRoberts.)

Q. Did you see that package? A. I did.

Q. Who had the package when you saw it?

A. Power Greer. It was on his desk—on a desk there.

Q. Do you know then of your own knowledge whether or not that package was ever called for by anyone at the Pan American office?

A. Yes, it was.

Q. Who called for the package? [53]

A. Well, somebody called over the telephone for it, but a taxi driver, Brazell, called for it in a Checker cab.

Q. Did he have any indicia of ownership or any claim or right to get the package? Did he show it?

A. He had a letter of authority.

Q. Were you—just yes or no—did you learn from whom he had obtained that authority?

A. Yes.

Q. Now, when the cab driver came into the Pan American office, following his arrival there, would you state to the jury what you did?

A. The Pan American man came in. We were in a little room, connected room, set off from the cargo office, right next door, right by it. Mr. Greer and myself with the package and as I say, the man came in and then we came out with the package. Mr. Greer had the package. He walked out and accosted the taxi driver and told the taxi driver to deliver us to where he got the note.

Q. Did he deliver you there?

(Testimony of Theodore R. McRoberts.)

A. Yes, he did.

Q. Where was that address?

A. 642 - 6th.

Q. Which address?

A. 642 - 6th—4th I mean. Pardon me.

Q. What did you do on your arrival at that address? Did [54] you get—you were in the cab, were you?

A. Yes.

Q. Did you get out of the cab?

A. Yes, we got out of the cab and went to the house.

Q. Did you see the defendant there at the house?

A. Yes, I did.

Q. Just yes or no, Mr. McRoberts, did you have or hear any conversation in the presence of this defendant at that time?

A. Yes.

Q. Where was that conversation?

A. Just inside the house.

Q. And when was the conversation?

A. Right after we entered the house.

Q. That would be on February 10th?

A. February 10th.

Q. Who was present?

A. The defendant and Greer and Brazell and myself and another girl who give her name as Betty Austin.

Q. Do you have a recollection of that conversation at this time, the substance of it?

A. Yes.

Q. Would you state to the jury what was said in the presence of the defendant?

A. Mr. Greer asked Brazell first to point out

(Testimony of Theodore R. McRoberts.)

the lady that gave him—which one of the 2 ladies gave him the note [55] and he pointed out the defendant and then Mr. Greer took the package over to the defendant and with the note opened up and asked her if she had written and signed that note and she admitted she had. So, he said, “Here’s the package” and she didn’t—wouldn’t take the package. She said the package wasn’t hers, that she was just getting it for someone else.

Q. Was she asked for whom she was getting the package? A. Yes.

Q. Did she respond to that question?

A. No, she did not.

Q. I show you government’s identification number 2 and ask you to examine it please (handed to witness). State if you know what it is?

A. Yes. This was the wrapper on the package that we delivered.

Q. You saw that wrapper when it was around the package, did you? A. Yes, I did.

Q. Do you know of your own knowledge, Mr. McRoberts, what was in that package?

A. Well, there was quite a bit of paper in there and packing and there was a little wooden curved box in there and a—also a package—an envelope of some white powder that Mr. Greer said was heroin. [56]

Q. Oh, you have testified concerning this note. Do you have that note, Mr. McRoberts?

A. No, I haven’t.

Mr. Taylor: Just a moment. We are objecting

(Testimony of Theodore R. McRoberts.)

to any testimony regarding this note as under the—not the best evidence.

The Court: Objection overruled.

Q. (By Mr. Hepp): You say you don't have the note? A. No.

Q. Do you know where it is?

A. No, I don't. Mr. Greer lost it at the time or mislaid it or something.

Q. Where did you last see that note?

A. I last saw the note when he showed it to the defendant here.

Q. And that was the time you testified here when you went down there? A. Yes.

Q. I show you government's identification number one, Mr. McRoberts and ask you if you can identify it please (handed to witness).

A. Yes.

Q. Examine it.

A. This is the wooden box that was packed in the big box. [57] This is the package we were referring to—talking about.

Q. When did you see first those contents?

A. I saw this first at the Pan American office.

Q. When? A. On February 10th.

Q. I see. And that is—is that the box around which this wrapper that you have testified concerning was placed? A. Yes, that is.

Q. Is this the little wooden container you have testified to? A. Yes.

Mr. Hepp: You may question this witness.

(Testimony of Theodore R. McRoberts.)

Cross-Examination

Q. (By Mr. Taylor): Mr. McRoberts, at whose request did you go to the Pan American Airways about 10:30 on the morning of the 10th of February, 1951? A. Mr. Greer.

Q. And you say that when you walked in there, there was a package on a desk in the—where Mr. Greer was? A. Yes.

Q. Where was that desk? What room was it in?

A. Right behind—you go behind the counter of the Pan [58] American cargo office and it is a little door beyond the office to the right, right behind the counter.

Q. That was concealed from the main office, was it?

A. Yes, yes, pretty much from the front of the office. It isn't concealed from the—from back of the counter, no.

Q. Now, Mr. McRoberts, about what time was it that taxi driver came into the Pan Am office?

A. About 12:30 I believe.

Q. And did you see him come into that office?

A. Yes. I was—I didn't see him come in the door. We were sitting back where you're looking out this door and I heard him come in the door to the counter.

Q. And what did he say when he came to the—

A. He delivered the note to the cargo man and asked for a package that he was to get.

Q. And the cargo man brought the package to

(Testimony of Theodore R. McRoberts.)

you then? A. No, he brought the note to us.

Q. To you? A. To Mr. Greer.

Q. What was the signature on that note, Mr. McRoberts? A. Juanita Pearson.

Q. Did you ever know of a Juanita Pearson in Fairbanks? A. No.

Q. Have you made any investigation to ascertain who Juanita Pearson is? [59]

A. Yes, limited.

Q. Now, what investigation did you make to ascertain whether a Juanita Pearson——

A. We just made inquiries.

Q. Whereabouts?

A. Well, I don't know. The deputies would make inquiries around here and there and I asked different people I knew. That's all. I looked through the telephone directory.

Q. Did you check the hotels? A. No.

Q. Or the passenger lists of the air companies serving out of here? A. No.

Q. Now, I believe you stated that you rode in the taxi cab to 642 - 4th? A. Yes.

Q. And what did you first see when you arrived at 642 - 4th?

A. Well, when we got out, the door was partly open and somebody was looking out the door when we got out of the cab and then we walked up to the door. Mr. Greer led the way.

Q. What?

A. Mr. Greer led the way and we walked up to the door.

(Testimony of Theodore R. McRoberts.)

Q. And where did you go then?

A. We went inside. [60]

Q. And what was said about you and Mr. Greer going into Mrs. Simpson's home?

A. To my memory, nothing. I don't recall anything.

Q. Did you just walk inside—right on in?

A. Yes, the door was open and we walked in.

Q. Did you see a dog outside there?

A. Yes, I think probably she had put the dog out or the dog had come out. The door was open anyway, whether she put it out or whether it come out.

Q. When the dog went out, you went in?

Q. Now, Mr. McRoberts, are you sure at the time Mr. Greer asked Mrs. Simpson if she had written that note that he asked her whether she had written the note, or, whether she had just given the taxi driver the note?

A. He asked her if she had signed that note and had given the taxi driver the note. He asked her both.

Q. And what did she say to that?

A. She hesitated a little bit and said yes.

Q. How long did she hesitate?

A. Well, just a matter of—probably a matter of seconds.

Q. Was there any conversation with the taxi driver before Mr. Greer had the conversation with Mrs. Simpson?

(Testimony of Theodore R. McRoberts.)

A. Mr. Greer asked the taxi driver to take us to where he got the note. [61]

Q. And after they arrived at 642 - 4th, did Mr. Greer have any conversation with the taxi driver there?

A. He asked the taxi driver to point out the woman that give him the note.

Q. What did Mr. Greer do with this note after he got inside, Mr. McRoberts?

A. I do not know. The last I saw of it was when he showed it to the defendant.

Q. Did you search for the note?

A. Afterwards when we were ready to leave, he asked me if I had the note, if he had handed the note to me and I said no.

Q. And this search you made, how extensive was that, Mr. McRoberts?

A. Just looked around the room where he was and where he left the package.

Q. Did you look in the medicine cabinet in the bathroom to see if the note was there?

A. I don't recall.

Q. Did you look in the dresser drawers or drawers of any sort around there?

A. To see a note?

Q. Looking for anything? Were you looking for that or other things?

A. Oh, yes, we looked through the dresser drawers. [62]

Q. In fact, you searched the place, did you not?

A. Searched for narcotics.

(Testimony of Theodore R. McRoberts.)

Q. And you found some money orders and receipts, did you not, Mr. McRoberts?

A. I believe there was some telegraphic receipts, money telegrams.

Q. And some letters?

A. Yes, the letters were stamped to be mailed.

Q. And you took those letters? A. Yeah.

Q. Did you take any letters that had been addressed to Mrs. Simpson?

A. I don't recall any letters. Whether Mr. Greer did or not, I do not know. I didn't. He handed me some stuff and told me to keep it for him.

Q. Isn't it a fact, Mr. McRoberts, that you had in your possession or possibly still have them, certain money order receipts and telegraphic receipts and letters belonging to Mrs. Simpson?

Mr. Hepp: Just a minute, Mr. McRoberts. I am going to object to this unless counsel can show how it relates into the issues before this court. I don't see that there is any reason—it is time consuming, but I think counsel should show where in this trial it is related in order to properly offer this kind of evidence. [63]

The Court: Objection overruled.

Witness: Will you state that question again please?

Mr. Taylor: Read the question, Mr. Reporter.

(The question was read to the witness as follows:)

“Q. Isn't it a fact, Mr. McRoberts, that you

(Testimony of Theodore R. McRoberts.)

had in your possession or possibly still have them, certain money order receipts and telegraphic receipts and letters belonging to Mrs. Simpson?"

Witness: No, I haven't them in my possession.

Q. (By Mr. Taylor): What did you do with those items?

A. Well, I returned the—the boys returned it to Mrs. Simpson when we turned her loose.

Q. Now, Mr. McRoberts, was there any letters, money order receipts, or any other written memoranda around that house that had the name of Juanita Pearson?

A. Not to my knowledge.

Q. You did not see any? A. No.

Q. You did make an extensive search of the premises, did you? [64]

A. Fair, yes, uh-huh.

Mr. Taylor: That's all.

Mr. Hepp: I believe that's all. May we have a few minutes recess, your Honor?

The Court: Yes, we will take a 10 minute recess.

(At this time, a short recess was taken and thereafter the trial of this cause was resumed.)

The Court: Counsel stipulate all members of the jury are present?

Mr. Taylor: Yes, your Honor.

Mr. Hepp: We will so stipulate, your Honor.

(Testimony of Theodore R. McRoberts.)

The Court: Very well. Ready to continue the case?

Mr. Hepp: Ready.

Mr. Taylor: Yes, your Honor.

The Court: Very well.

Mr. Hepp: Mr. Brazell, please.

JAMES R. BRAZELL

called as a witness in behalf of the Plaintiff, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Hepp): Would you state your name to the jury please?

A. James Russell Brazell.

Q. Where do you live, Mr. Brazell?

A. 1518 Cushman.

Q. That's in Fairbanks, is it?

A. Fairbanks, Alaska.

Q. How long have you lived around these parts?

A. I lived here—I have been here a year ago yesterday.

Q. What is your occupation? What do you do?

A. Cab driver.

Q. What company do you drive for?

A. Now, I drive for Radio. I have drove for Checker before.

Q. On or around the date of February 10th, for whom were you driving?

A. I was driving for Checker Cab.

Q. Do you know Leona Simpson, the defendant, here?

A. I have seen her, yes.

(Testimony of James R. Brazell.)

Q. Tell me Mr. Brazell, did you have occasion to transact any business with Leona Simpson on the 10th day of February of this year?

A. Yes, I did.

Q. Will you state what brought that about?

A. On the 10th, she called the office for a cab and they sent me to her house. She gave me a note and I went to Pan American with it. [66]

Q. Did she state to you what you were supposed to do with the note or what it was for?

A. She said she had a package in the cargo office and she had to sign a note for me.

Q. Did you go and get the package?

A. I did, yes.

Q. About what time of the day was that, sir?

A. Well, it was just before noon, I believe.

Q. What occurred—you went to the Pan American cargo office or some—

A. I went to the one here in town behind the Nordale.

Q. I see. What happened when you got there?

A. I gave the note to the kid that worked there and he took it to the back room and they come out in a little while. Two fellows come in and got me.

Q. Do you know who they were?

A. Mr. Greer and Mr. McRoberts.

Q. Do you know who—what their status was?

A. I didn't at the time, but they told me.

Q. What happened then?

A. Well, they asked me where I got the note and they asked me if I got it at that address that was

(Testimony of Theodore R. McRoberts.)

(Testimony of James R. Brazell.)

on the note and I said no and he asked me where I got it and I told him.

Q. Then what happened?

A. I told him it was from 642 4th and I was to take the [67] package back.

Q. And did——

A. He asked where I was to take it. I said 642 4th and he said, “Good, I’ll go right along with you.”

Q. Did he go along with you?

A. Yes, he did, him and Mr. McRoberts.

Q. Where did you go to?

A. I went to 642 4th and parked in front.

Q. And would you just state what happened starting with—did you get out of the car?

A. I think Mr. Greer got out first and I got out second and then Mr. McRoberts got out behind me.

Q. And what happened then. Please state it for the jury.

A. Then we went to the door. Mr. Greer went in first, I was second and McRoberts followed and he asked her if she wrote that note and she said yes. And he asked her if she had me to get the package for her and she said yes, she did. He asked her if that was her package and she said no, it wasn’t hers. So then he told her that—what was in the package and I think he told her she was under arrest and that she would have to go with him.

Q. Now, I ask you to look at the defendant here and state whether or not she is the Leona Simpson that you have been talking about?

(Testimony of James R. Brazell.)

A. Yes, she is. [68]

Q. She is the one that gave you the note?

A. Yes, sir.

Mr. Hepp: You may question this witness.

Cross Examination

Q. (By Mr. Taylor): Did you see her write the note, Mr. Brazell?

A. No, I did not see her write the note. They called me over there and when I got there, she gave it to me and explained why she gave it to me.

Q. Did she explain to you that it was a package for another person?

A. No, at the time she didn't because when they showed me the note over there, that's the first time I had looked at it and then that's why they asked me and I told them it went back to 642 4th.

Q. Did you read the note before you went to the Pan Am office? A. No, sir; I did not.

Q. Was it in an envelope?

A. No, sir; it was just folded.

Q. And you don't know how long prior to the time that you went down there that that note was written then, do you Mr. Brazell? [69]

A. No, I don't.

Q. Now, from your scrutiny of that note and the way it was folded, would you be led to believe that that note had been written a considerable time before?

Mr. Hepp: Just a minute. I object to that as calling for a pure conclusion. I don't know how this

(Testimony of James R. Brazell.)

witness can tell by looking at a note how long ago it had been written. I object to it for that reason.

The Court: Let him answer it if he can.

Witness: I don't honestly know. It had been written and folded. It was just a note and it had been folded.

Q. (By Mr. Taylor): What was the condition of the paper as to being clean and smooth or rumpled?

A. It was very clean. It was very smooth.

Q. While you were at the Pan Am office, did you pick up any package, Mr. Brazell?

A. No, I did not.

Q. Did you at any time have that package that is on the table there in your possession?

A. No, I didn't.

Mr. Taylor: No more questions.

Mr. Hepp: That's all. [70]

(At this time, Mr. James Brazell left the witness stand.)

Mr. Hepp: Mr. Barnes, please.

JERRY BARNES

called as a witness in behalf of the Plaintiff, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Hepp): Would you state your name to the jury please? A. Jerry Barnes.

Q. Where have you worked, Mr. Barnes?

A. At present I work for Northern Consolidated Airlines.

(Testimony of Jerry Barnes.)

Q. How long have you lived around these parts, Mr. Barnes? A. Two years.

Q. By whom were you employed on February 10th of this year?

A. Pan American Airlines.

Q. And where was your station of work?

A. The cargo office in the Nordale Hotel.

Q. Mr. Barnes, I am going to show you government's identification number two (handed to witness) and ask you to examine it and state whether or not you have ever seen that in the course of your duties? A. Yes, I have seen it.

Q. When did you see that? [71]

A. When it arrived at Fairbanks by Pan American aircraft.

Q. It came in on a Pan American aircraft, you say? A. Yes, sir.

Q. Did you have that package down in the cargo office at Pan American? A. Yes, we did.

Q. Do you know whether or not that package was ever delivered to anyone?

A. It was, certainly.

Q. The package around which that——

A. Yes, sir, it was.

Q. To whom was it delivered?

A. Delivered to a cab driver.

Q. Did this cab driver show any indicia or ownership or claim or right to the delivery of this package?

Mr. Taylor: Just a moment. We are objecting to

(Testimony of Jerry Barnes.)

the question as calling for a conclusion of the witness, incompetent, irrelevant and immaterial.

The Court: Objection overruled.

Q. (By Mr. Hepp): Would you answer the question please?

A. The cab driver presented a letter of authorization from the addressee giving us the authority to give him the package.

Q. Did you see that letter? A. I did. [72]

Q. What did you do when you saw that letter, Mr. Barnes?

A. Well, I read it, saw it contained the material it should contain and had him sign the airway bill and proceeded to get the package.

Q. I see. And in that regard, what did you do?

A. Well, Mr. Greer was very near-by so I went to get him. He had possession of the package at that time and he brought the package out and gave it to the cab driver. He didn't give it to the cab driver. He took the situation over as of that time.

Q. Was anyone in the company of Mr. Greer?

A. Yes, the Marshal at that time, Ted McRoberts.

Q. I see. Do you know when this package was received in Fairbanks.

A. The 7th of February in the morning.

Q. That is of this year? A. This year.

Q. Tell me Mr. Barnes, did you ever receive any inquiry by any means concerning this package from anyone?

A. On the morning of the 10th.

(Testimony of Jerry Barnes.)

Q. On the morning of the 10th?

Mr. Taylor: Your Honor, I am going to object unless—inquiry into what matter?

Q. (By Mr. Hepp): I believe you have testified concerning the package, [73] the wrapper of which you have identified here? A. That's right.

Q. Did you receive any inquiry concerning that package, Mr. Barnes?

Mr. Taylor: Just answer yes or no.

Witness: Yes.

Q. (By Mr. Hepp): When did you receive the inquiry?

A. The morning of the 10th of February.

Q. And by what means did you receive the inquiry? A. Over the telephone.

Q. Was it—were you able to determine whether it was a male or a female voice?

Mr. Taylor: Just a moment, your Honor. I am going to object to the question, incompetent, irrelevant and immaterial; calling for a conclusion of the witness.

The Court: Objection overruled.

Q. (By Mr. Hepp): Would you answer that question please?

A. As far as I could determine, it was a female voice.

Q. Did this voice identify itself?

A. I can't remember for sure just whether she identified herself directly or not, but I assumed that it was the person to whom the shipment was consigned. [74]

(Testimony of Jerry Barnes.)

Q. Was the conversation relating to the delivery or other disposition of this package?

A. She wanted to know if the shipment was in. I told her it was and she told me she would send somebody down to pick it up.

Q. What did you say in response to that?

A. I told her she would have to have a letter of authorization for anyone other than herself to have it picked up.

Q. Did that conclude that conversation?

A. Yes.

Mr. Hepp: You may question the witness.

Cross Examination

Q. (By Mr. Taylor): Is it—was it the policy of the company for another party to pick up a package that they have a letter of authorization?

A. Generally, no.

Q. Why did you have to have a letter of authorization to deliver that package to the taxi driver?

A. I was acting on the instructions of Mr. Greer.

Q. Did you retain that letter in your files at the Pan American, Mr. Barnes? A. I did not.

Q. Now, you say that at the time you went to get the package that Mr. Greer had possession of it?

A. That's right.

Q. And how long had he had possession of it?

A. You mean in hours and minutes?

Q. Days.

A. It wasn't days. I don't know just how long it was.

(Testimony of Jerry Barnes.)

Q. Isn't it a fact that he picked that package up on the morning of the 9th of February?

Mr. Hepp: I object to that unless there is a showing this witness knows something about that. I don't think there is a proper foundation for that kind of a question.

The Court: Objection overruled.

Witness: What was the question?

Mr. Taylor: Will you read the question, Mr. Reporter?

(The question was read to the witness as follows:)

“Q. Isn't it a fact that he picked that package up on the morning of the 9th of February?”

Witness: It was either the morning or the evening. It was on the 9th I believe that he picked it up. [76]

Q. (By Mr. Taylor): The day before the taxi driver came for it?

A. I believe so, the day before.

Q. And did he return the possession of that package to you or to the Pan American Airways prior to the time that the taxi driver came there?

A. I don't know. Mr. Greer took full control of the situation and I had nothing to do but continue on with my ordinary duties.

Q. Did Mr. Greer show you authorization to take care of that package?

(Testimony of Jerry Barnes.)

A. He showed his identification. I consider that authorization enough.

Q. What?

A. I considered that authorization enough.

Q. Without a search warrant?

Mr. Hepp: I object to that. There is—I think the court has ruled on that matter before and——

The Court: Yes.

Mr. Hepp: ——as to the matter of a search warrant.

The Court: Objection sustained.

Q. (By Mr. Taylor): And then you got a telephone call about that and you assumed it was a lady by the name of Juanita Pearson that [77] called you? A. That's correct.

Mr. Taylor: That's all.

Mr. Hepp: No further questions.

(At this time, Mr. Jerry Barnes left the witness stand.)

Mr. Hepp: Mr. Harris, please.

MELVIN G. HARRIS

called as a witness in behalf of the Plaintiff, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Hepp): Would you state your name to the jury, sir?

A. Melvin G. Harris.

Q. Where do you live, Mr. Harris?

A. Fairbanks, Alaska.

(Testimony of Melvin G. Harris.)

Q. How long have you lived around these parts?

A. Five years.

Q. By whom are you employed?

A. Pan American World Airways.

Q. And how long have you been so employed?

A. Four years.

Q. What is your station of duty?

A. Nordale Hotel, Fairbanks. [78]

Q. Were you at your office or at your work around the early part of February of this year?

A. I was.

Q. What is your position incidentally?

A. Cargo traffic supervisor.

Q. Sir? A. Cargo traffic supervisor.

Q. I show you government's identification number 2 (handed to witness) and ask you to examine it please and state if you have ever seen that before?

A. Yes, that came in on our station approximately February 7th.

Q. Is that of this year? A. This year.

Q. Was—would you—is that just a wrapper—

A. That's a wrapper off of a package moved on freight bill 516533 which weighed approximately one pound.

Q. To whom was the package addressed?

A. Mrs. Juanita Pearson, Fairbanks, Alaska.

Q. To your knowledge Mr. Harris, was that package ever delivered to anyone?

A. That package was delivered to—let's see. It

(Testimony of Melvin G. Harris.)

was in the custody of the United States Treasury February 9th.

Q. Do you know the name of the—— [79]

A. Mr. Greer.

Q. Do you know when he took custody or when he was given custody of this package?

A. It was on February 9th.

Q. On February 9th? A. That's right.

Q. Did you ever see the package again?

A. Yes. On February 10th, he returned the package still in his custody to our office.

Q. Do you know of your own knowledge Mr. Harris whether or not anyone ever called for that package for the delivery of it?

A. I wasn't there at the time. I was out to lunch.

Q. I see. Do you know of your own knowledge what that package contained?

A. Inside the package was a small box. I guess you would call it a powder box. There was small wrapping paper or some kind of white powder. I couldn't say what it was.

Q. Had the package been broken or something?

A. The package was damaged at the time that it was first tendered for delivery to Mr. Greer and because it was damaged, it was opened for inspection to determine the exact damage to the contents.

Q. You say this is the wrapper around——

A. That's correct. [80]

Q. Do you know the defendant, Leona Simpson?

A. No, I don't.

Q. And I will show you a portion of govern-

(Testimony of Melvin G. Harris.)

ment's identification number one (handed to witness) and ask you to examine it and I will show you the whole identification (handed to witness). State if you recognize or know what this is, Mr. Harris?

A. That is the carton that traveled under that weigh bill assigned to Juanita Pearson.

Q. You recognize it as having seen it before?

A. Yes.

Mr. Hepp: I have no further questions.

Cross Examination

Q. (By Mr. Taylor): Mr. Harris, at the time that Mr. Greer brought this package back to the Pan Am office, did he still retain the possession of it or did he put it back in the possession of the Pan American Airways?

A. He still retained possession.

Q. So then, from the morning of the 9th of February, Mr. Greer had the possession of this package?

A. That's correct.

Mr. Taylor: That's all. [81]

Redirect Examination

Q. (By Mr. Hepp): Well Mr. Harris, would that have been possession or custody?

A. I imagine you would call it custody.

Q. Did he claim any ownership in that package?

A. No, he did not.

Q. Did he assume by any statement that he made any ownership or right of possession other than in the course of his duties?

(Testimony of Melvin G. Harris.)

Mr. Taylor: Just a moment, Mr. Harris. We are going to object to the question as calling for a conclusion of the witness and assuming something not in evidence.

Mr. Hepp: Your Honor, counsel has been doing that—indulging in that all the way through this trial and I just want to establish what type of possession or custody or control it is.

Mr. Taylor: This——

Mr. Hepp: I think I have a right to go into a matter he has raised.

Mr. Taylor: I didn't raise it, your Honor.

The Court: What was the question [82] now?

Mr. Hepp: My question was whether he had done any act or made any statement that indicated an ownership or a possession that was over and above which his official duties called for.

Mr. Taylor: That is too inclusive, your Honor.

The Court: Objection will be overruled. You may answer.

Witness: He, on February 9th when the package was originally turned over to him, showed his identification to me as a treasury agent and said he was taking custody of the package for the government.

Mr. Hepp: That's all.

Recross Examination

Q. (By Mr. Taylor): And from then on Mr. Harris, it was in his possession, is that right?

A. That's correct.

(Testimony of Melvin G. Harris.)

Mr. Taylor: I see. That's all.

Mr. Hepp: No further questions.

(At this time, Mr. Harris left the witness stand.)

Mr. Hepp: Mr. Hugo Ringstrom please. [83]

HUGO RINGSTROM

called as a witness in behalf of the Plaintiff, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Hepp): Would you state your name to the jury, sir? A. Hugo Ringstrom.

Q. Where do you live, Mr. Ringstrom?

A. Seattle, Washington.

Q. How long have you lived there?

A. 26 years.

Q. By whom are you employed?

A. By the Alcohol Tax Unit, Federal Government.

Q. Is that any relation to the Treasury Department, Mr. Ringstrom?

A. It is part—it is in the Treasury Department.

Q. How long have you been employed in that Tax Unit—Alcohol Tax Unit?

A. Since the unit was formed and in similar work since 1923.

Q. What type of work do you do?

A. Analytical work.

Q. Could you state that in terms more familiar

—— [84]

(Testimony of Hugo Ringstrom.)

A. Analyze alcoholic liquors and narcotics.

Q. Is that related to the field of chemistry?

A. Yes, sir.

Q. Tell me Mr. Ringstrom, do you hold—have you ever been schooled in the field of chemistry or this analytics as you called them?

A. Yes, sir.

Q. Where did you receive your training?

A. School of Chemistry, University of Minnesota.

Q. Do you hold any degrees in the field of chemistry?

A. Yes, sir.

Q. What degrees do you hold?

A. Bachelor of Science and Master of Science in chemistry.

Q. I see. Now, since your employment began with the department, have you always worked in this field?

A. Yes, sir.

Q. It always has been in the same field as a chemist, has it?

A. Yes, sir.

Q. Could you state to the jury approximately how many analyses of narcotics you have made in the course of your employment?

A. I can merely make a rough estimate—several thousand—four or five thousand.

Q. I show you government's identification number three [85] (handed to witness) and ask you to examine it. State if you have ever seen that before.

A. I have.

Q. Where did you see that?

(Testmony of Hugo Ringstrom.)

A. In the Alcohol Tax Unit laboratory in Seattle, Washington.

Q. Was there anything in that—what is that please, Mr. Ringstrom?

A. That is a registered envelope.

Q. Was there anything contained in the envelope when you saw it first? A. Yes, sir.

Q. What was in it, sir?

A. Locked sealed envelope that the narcotic officers use.

Q. And what was—was there anything in that envelope? A. Yes, sir.

Q. What was in that, sir?

A. A paper bag containing white powder.

Q. Did you do any act in analyzing what that white powder was? A. Yes, sir.

Q. What did you do?

A. I made the necessary tests to determine what it was.

Q. Did you learn what it was?

A. Yes, sir. [86]

Q. What was it?

A. Heroin hydrochloride.

Q. What does that—would you explain what heroin hydrochloride is? What is that, a compound?

A. It is a sort—heroin hydrochloride is a sort of heroin.

Q. Is heroin an organic compound? What is heroin? A. It is a narcotic.

Q. I see. What is—what does the word hydrochloride signify?

(Testmony of Hugo Ringstrom.)

A. That is the salt formed with heroin and hydrochloric acid.

Q. Is that a common combination found in narcotics?

A. It is the only combination I recall ever having run across in the case of heroin.

Q. Do you know how much, by weight, white powder was in this envelope? A. Yes, sir.

Q. How much? A. 358 grains.

Q. In relation to an ounce, how much would that be?

A. It is little more than $\frac{3}{4}$'s of an ounce.

Q. Mr. Ringstrom, in the course of your duties, have you—do you have any idea or knowledge of the market value either illicit or licit market value of that powder? [87]

Mr. Taylor: Just a moment, Mr. Ringstrom. We are going to object, your Honor, as to the value of this compound as irrelevant, incompetent and immaterial and has no bearing upon this case.

The Court: What is the relevancy of it?

Mr. Hepp: I will withdraw the question, your Honor. It is not important.

Q. (By Mr. Hepp): What did you do with the powder after you analyzed it, Mr. Ringstrom?

A. I kept it in my safe.

Q. Do you know where it is now?

A. Yes, sir.

Q. Where is it? A. In my pocket.

Q. Would you produce it please?

(Testmony of Hugo Ringstrom.)

(Locked sealed envelope handed by witness to Mr. Hepp.)

Mr. Hepp: I would like to have this marked for identification.

Clerk of the Court: Government's identification number four.

(At this time, a locked sealed envelope was introduced and marked as Government Identification [88] No. 4.)

Q. (By Mr. Hepp): I have here government's identification number four, Mr. Ringstrom and ask you to open it and inspect it and examine it at this time and state if you know what it is.

A. Yes, I know what it is.

Q. What is it please?

A. This is the locked sealed envelope containing the bag with heroin hydrochloride in it that was inside of the registered envelope that came to me from agent Greer.

Q. What is inside the—that locked sealed envelope that you are talking about?

A. A bag containing heroin hydrochloride.

Q. Does that powder have an odor?

A. No, sir.

Q. I believe you have stated that it is a narcotic. I would like you to make that statement if you haven't.

A. It is a narcotic.

Q. Would you include the word "narcotic drug" in that?

(Testmony of Hugo Ringstrom.)

A. Sometimes it is referred to as a drug also.

Q. Is heroin legitimately manufactured now, Mr. Ringstrom? A. No, sir, it is not.

Q. Incidentally Mr. Ringstrom, referring back to this government's identification number three that you have testified was a registered envelope, do you know where that has [89] been since you have received it? A. Yes, sir.

Q. Where has it been, sir?

A. In my possession.

Q. Did you ever surrender the possession of that? A. No, sir.

Q. Your—you brought it here——

A. Until I brought it to court.

Q. Mr. Ringstrom, do you know why heroin is not legally manufactured?

Mr. Taylor: Just a moment, your Honor. We are going to object to the question as incompetent, irrelevant and immaterial. It has no bearing upon the issues and it is prejudicial.

The Court: Where—what is the relevancy of it?

Mr. Hepp: If counsel objects to it, I will withdraw the question.

The Court: Very well.

Mr. Hepp: You may question the witness.

Mr. Taylor: No questions.

(At this time, Mr. Hugo Ringstrom left the witness stand.)

Mr. Hepp: At this time, your Honor, [90] I offer into evidence plaintiff's identification number

one which has been described as a container delivered through Pan American office.

Mr. Taylor: No objection.

The Court: May be admitted.

Clerk of the Court: Plaintiff's Exhibit "A".

(At this time, Plaintiff's Identification No. 1 was offered into evidence and marked as Plaintiff's Exhibit "A".)

Mr. Hepp: At this time, I offer government's identification number two being described as the wrapper of the package that is identified as number one.

Mr. Taylor: No objection.

The Court: May be admitted.

Clerk of the Court: Plaintiff's Exhibit "B".

(At this time, Plaintiff's Identification No. 2 was offered into evidence and marked as Plaintiff's Exhibit "B".)

Mr. Hepp: At this time, I offer into evidence plaintiff's identification number three being identified as a registered envelope.

Mr. Taylor: No objection.

The Court: May be admitted. [91]

Clerk of the Court: Plaintiff's Exhibit "C".

(At this time, Plaintiff's Identification No. 3 was offered into evidence and marked as Plaintiff's Exhibit "C".)

Mr. Hepp: At this time, I offer government's identification number four being a locked sealed envelope in which there is contained a narcotic.

Mr. Taylor: No objection.

The Court: May be admitted.

Clerk of the Court: Plaintiff's Exhibit "D".

(At this time, Plaintiff's Identification No. 4 was offered into evidence and marked as Plaintiff's Exhibit "D".)

Mr. Hepp: The government rests its case.

Mr. Taylor: If the court please, I would like to make a motion out of the hearing of the jury.

The Court: The jury will retire in the hallway and remain until notified to return.

(At this time, the jury left the courtroom.)

Mr. Taylor: If the court please, at this time I would like to make—move for this court for [92] an order directing a verdict of acquittal upon the grounds of a total failure of proof to show the possession or the custody or control of the narcotics mentioned in plaintiff's complaint.

(Mr. Taylor continued with his argument to the court.)

(At the conclusion of Mr. Taylor's argument, Mr. Gilbert on behalf of the government presented his argument to the court resisting the motion.)

(Mr. Taylor presented further argument to the the court on behalf of the defendant.)

(Mr. Hepp presented further argument to the court on behalf of the government.)

The Court: I think that there has been no crime of the—no proof of the crime alleged in the information, that is, the possession or control of the narcotic, but I believe that there has been proved an attempt to commit that crime which is covered by our general laws. The section that Mr. Taylor has just cited doesn't take away the right to prosecute under the attempt as an included crime in the information. So, I will instruct the jury when we get down to the final instructions that there is no crime as charged, but there is an included crime. I will therefore overrule your motion to that extent. We will take a 10 minute recess. Tell them to be in their seats in 10 [93] minutes.

Mr. Taylor: Your Honor, I wonder if it would be possible to adjourn until tomorrow morning. After a 10 minute recess, we will have very little time to——

The Court: Very well. Call them in then.

(The jury re-entered the courtroom.)

The Court: Counsel stipulate all members of the jury are present?

Mr. Taylor: Yes, your Honor.

Mr. Hepp: We will so stipulate.

The Court: We are going to adjourn in a moment until ten o'clock tomorrow morning.

(At this time, the court duly admonished the jury.)

The Court: Make the adjournment.

Clerk of the Court: Court is adjourned until 10 o'clock tomorrow morning.

(At 4:25 o'clock p.m., the trial of this cause was adjourned until 10 o'clock a.m. on Tuesday, May 15, 1951.)

Be It Remembered, that upon the 15th day of May, 1951 at the hour of 10 o'clock a.m., the [94] trial of this cause was resumed, the defendant being in court in person and represented by counsel, the Honorable Harry E. Pratt, District Judge, presiding:

The Court: Call the roll of the jury.

(Whereupon, the Clerk of the Court proceeded to call the roll.)

Clerk of the Court: They are all present, your Honor.

The Court: Counsel ready to proceed with the trial.

Mr. Taylor: Yes, your Honor.

Mr. Hepp: Ready, your Honor.

The Court: Very well.

Mr. Taylor: If the court please, the defendant rests. At this—out of the presence of the jury, I would like to make a motion to the court please.

The Court: Very well. The jury will retire until called please.

(At this time, the jury left the courtroom.)

(At this time, Mr. Taylor on behalf of the defendant renewed his motion for a directed verdict in favor of the defendant.)

(At the conclusion of Mr. Taylor's argument, Mr. Hepp presented argument to the court resisting [95] defendant's motion.)

(Mr. Taylor presented further argument to the court on behalf of the defendant.)

The Court: I think the section that counsel has just read doesn't bar them from prosecuting for an attempt to commit another crime. All throughout our laws, there are crimes which are denounced and then if there is merely an attempt to commit the crime, why then it falls under the general section as to an attempt to commit a crime and it would be rather unusual to have this one crime in which you couldn't prove an attempt to commit it. Motion will be denied. Call the jury.

Mr. Hepp: We are willing to waive the reporter taking the arguments of this cause.

Mr. Taylor: I will waive it.

The Court: Very well.

(The jury re-entered the courtroom.)

The Court: Counsel stipulate all members of the jury are present?

Mr. Taylor: Yes, your Honor.

Mr. Hepp: We will so stipulate.

The Court: Very well. Mr. Reporter, under stipulation of counsel, you may be excused from taking the argument.

(At this time, the court stenographer [96] left the courtroom.)

(Counsel for the government and the defendant presented their arguments to the jury.)

The Court: Counsel stipulate that all members of the jury are present?

Mr. Taylor: Yes, your Honor.

Mr. Hepp: We will so stipulate.

(At this time, the court read the instructions to the jury as follows:

[Title of District Court and Cause.]

INSTRUCTIONS TO THE JURY

1.

(a) The defendant is charged, in the information in this case, with having had unlawful possession and control of a narcotic drug, to-wit: heroin, upon the 10th day of February 1951 in the Fairbanks Precinct, 4th Division, Territory of Alaska;

(b) The jury is instructed that there is insufficient [97] evidence in this case to warrant finding the defendant guilty of the crime charged in said information and that therefore the jury should find the defendant not guilty of the crime charged in said information.

2.

(a) The law of Alaska provides that in a trial upon an information or indictment for a crime, the jury may find the defendant not guilty of the crime charged but guilty of an attempt to commit the crime charged in the information or indictment if

the evidence in the case proves the defendant to be guilty of such an attempt;

(b) You the jury should ascertain from the evidence in this cause whether or not the defendant is guilty of an attempt to commit the crime charged in the information on file in this cause and mentioned above in paragraph (a) of instruction number one.

3.

(a) The law of Alaska provides that if any person attempts to commit a crime and in such attempt does an act toward the commission of such crime but fails or is prevented or intercepted in the perpetration thereof such person, if proven guilty of such attempt beyond a reasonable doubt, shall be punished as provided by law.

(b) To constitute an attempt to commit a crime there must be something more than a mere intention to commit the [98] offense and there must be something more than a mere preparation to commit the offense. There must be such an overt act done in the commission of said crime which falls short of completing the act. Such act need not be the last proximate act before the consumation of the offense but it must be some act directed toward the commission of the offense after the preparations have been made.

(c) An overt act as mentioned in the last preceding sub-paragraph is one done to carry out the intention to commit the crime and it must be such as would naturally effect that result unless prevented by some extraneous cause.

4.

(a) It is asserted by the plaintiff in this case:

1. That the defendant, at the time and place mentioned in the information on file herein, had the intention of then and there getting possession and control of the narcotic drug, heroin, which was in the package (plaintiff's exhibit "D" in this case) in the cargo office of the Pan American Airways in the Nordale Hotel in the Town of Fairbanks, Alaska consigned to Mrs. Juanita Pearson, Fairbanks, Alaska;

2. That the said defendant then and there believed that said package contained heroin, a narcotic drug;

3. That said defendant then and there wrote and signed the name of Mrs. Juanita Pearson thereto, a letter addressed to said cargo office authorizing the employees [99] therein to deliver said package to a Mr. James Brazell, a driver for the Checker Cab Company in Fairbanks, Alaska;

4. That the said defendant then and there directed said James Brazell to go to said cargo office and get said package;

5. That said James Brazell then and there went to said cargo office and presented said letter to the employees therein and attempted to get said package from said employees for said defendant;

6. That said employee in charge of said cargo office did not deliver said package to said James Brazell solely because one Power G. Greer, a Treasury enforcement agent of the United States, then

and there had possession of said package and refused to allow it to be given to said Brazell;

7. That at the time defendant caused said James Brazell to go to said cargo office for said package, it appeared to her that in the usual course of events and if not hindered by extraneous causes, she could get possession and control of said package by causing said James Brazell to get it and bring it to her by presenting said letter to the employee in charge of said cargo office;

8. That defendant then and there believed that she could get possession and control of said heroin by sending said James Brazell for the same at said cargo office [100] and did not know that the means she had chosen for getting such possession of said heroin were blocked by said Power G. Greer;

(b) The jury is instructed that if they believe that each of the assertions of the plaintiff set forth above in this instruction have been proved to be true beyond a reasonable doubt, the jury should find the defendant guilty of the crime of attempting to commit the crime charged in the information herein;

(c) If on the other hand, the jury does not believe that each of said assertions of the plaintiff mentioned above in this instruction in paragraph (a), sub-paragraphs 1 to 8 inclusive have been proved to be true beyond a reasonable doubt, the jury should find the defendant not guilty of the crime of attempting to commit the crime charged in the information herein.

5.

You are instructed that the information is a mere

accusation and is not in itself any evidence of the defendant's guilt.

The defendant has pleaded not guilty to the matters set forth in said information. That plea puts in issue every material allegation of the information, and puts the burden of proof upon the plaintiff to prove every such allegation beyond a reasonable doubt. The defendant is presumed [101] to be innocent and until the plaintiff has proven every material allegation of said information beyond a reasonable doubt, the defendant is entitled to the continued benefit of the presumption of his innocence.

6.

You are instructed that there are two general classes of evidence, direct and circumstantial. Evidence as to the existence of the main fact in issue is direct evidence, while circumstantial evidence relates to the existence of facts which raise a logical inference as to the existence of the main fact in issue.

It is not necessary to prove a case by the testimony of eye witnesses, but the same may be established by facts and circumstances from which it may be reasonably and satisfactorily inferred, provided such facts and circumstances establish guilt beyond a reasonable doubt.

Circumstantial evidence is to be regarded by the jury in all cases where it is offered. Sometimes it is quite as convincing in its power as the direct and positive evidence of eye witnesses, and when it is strong and satisfactory the jury should so consider it, neither enlarging or belittling its force, but the

circumstances when taken together should be of a conclusive nature and tendency, leading on the whole to a satisfactory conclusion and producing in effect a reasonable and moral certainty that the accused committed the crime [102] charged. And it is an invariable rule of law that such facts and circumstances must be shown as are consistent with the guilt of the person charged and as cannot on any reasonable theory be true and the person charged be innocent.

7.

You are instructed that you should consider no evidence sought to be introduced but excluded by the court; nor should you consider any evidence stricken from the record by the court. You should not take into consideration any information which is not derived from the evidence or lack of evidence and pursuant to the court's instructions. Provided, however, that you should bring to bear upon the consideration of the evidence or lack of evidence in this case all of the common knowledge of men and affairs which you, as reasonable human beings, have and exercise in everyday affairs of life. Accordingly, you should draw from the evidence or lack of evidence in this case all deductions which appear to you to flow logically from the evidence or lack of evidence. Whatever verdict is warranted by the evidence under the instructions of the court, you should return as you have sworn to do.

8.

In regard to the term "reasonable doubt," as used

in these instructions and as defined by law, you are instructed as follows: [103]

(a) If, after considering all of the evidence in the case, there is in the minds of the jury a fixed conviction that the defendant is guilty and that conviction arises out of the evidence in the case, the jury would be justified in considering that there is no reasonable doubt in the minds of the jury in the sense in which the term is used in law.

(b) A doubt, to be such a reasonable doubt, must be actual and substantial and not a mere fanciful speculation. It cannot be a reasonable doubt if it ignores a reasonable interpretation of the evidence or lack of evidence within the power of a party to produce or arises merely from sympathy or a vague fear. The rule of law as to a reasonable doubt is a practical rule for the guidance of practical jurors when engaged in the solemn duty of assisting in the administration of justice and is not whimsical or fanciful. A doubt, to be a reasonable one must have a real substantial basis and not be mere fancy or conjecture. It must be such a doubt as would give rise to grave uncertainty and make the juror feel that he did not have an abiding conviction of the defendant's guilt. To prove a proposition beyond a reasonable doubt, the evidence or lack of evidence must be such that it would convince a prudent man of its truth to such a degree of certainty that he would feel like acting upon such conviction in matters of the highest importance to his own personal interests. [104]

9.

You are instructed that, as used with reference to the case now on trial:

The word "wilfully" means intentionally and deliberately, and implies knowledge on the part of the wrongdoer.

The word "unlawfully" means forbidden by law.

The word "feloniously" means the unlawful doing of an act which may be punished by imprisonment in the penitentiary, such as the crime charged in this case. The word "unlawfully" is included in the word "feloniously."

10.

You are instructed that the laws of the Territory of Alaska law down the following general rules for your guidance as to the value of evidence, to-wit:

1. That you are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your minds against a less number, or against a presumption or other evidence satisfying to your minds.

2. That a witness wilfully false in one part of his testimony may be distrusted in others.

3. That evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to [105] contradict; and, therefore,

4. That if the weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of of the party, the evidence offered should be viewed with distrust.

5. That oral admissions of a party should be viewed with caution.

11.

You are instructed as follows:

1. That you should not consider any evidence sought to be introduced, but excluded by the court, nor should you consider any evidence that has been stricken from the record by the court;

2. That it is manifestly impossible for the court to cover the law of this case in a few instructions and that, therefore, you should consider all the instructions together and not disconnectedly;

3. That wherever in these instructions the masculine is used, it shall be deemed to include the feminine, unless the context shows it to be inapplicable.

4. That you should endeavor to agree upon a verdict and should calmly reason with your fellows with the view of arriving at a verdict. You should not refuse to agree from pride of opinion, nor should you surrender any conscientious views founded on the evidence or lack of [106] evidence.

5. That wherever in these instructions the singular is used, it shall be deemed to include the plural, unless the context shows it to be inapplicable.

12.

You are instructed that in the trial of a criminal case the person accused is a competent witness in his own behalf, at his own request, but not otherwise, the credit to be given to his testimony being left solely to the jury under the instructions of the court. If the defendant does not choose to appear as

a witness in his own behalf, the laws of Alaska provide that his waiver to so testify shall not create any presumption against him, and you will, therefore, in this case not permit the failure of the defendant to testify to create any presumption in your minds against his innocence.

13.

In determining the credit you will give to a witness and the weight and value you will attach to his testimony you should take into account the conduct and appearance of the witness upon the stand; the interest he has, if any, in the result of the trial; the motive he has in testifying, if any is shown; his relation to or feeling for or against any of the parties to the cause; the probability or improbability of his statements; the opportunity he had to observe and to be [107] informed and the inclination he evinced to speak the truth or otherwise as to matters within his knowledge. It is your duty to give to the testimony of each and every witness appearing before you such credit as you consider the same justly entitled to receive.

You are further instructed that in your consideration of the evidence in this case you should analyze it in the light of the knowledge which your experience in life has given you, and you should draw from the evidence all logical and natural deductions and be governed accordingly.

14.

Pursuant to the foregoing instructions, I have prepared two forms of verdict which are self-explanatory.

You should elect a foreman and by him or her sign the verdict upon which you unanimously agree and return it into the court as your verdict.

Herewith I hand you these instructions for your guidance, together with the above mentioned forms of verdict, the exhibits that have been introduced and the information in this case. Return all of these into court with your verdict.

Dated at Fairbanks, Alaska this 15th day of May, 1951.

/s/ HARRY E. PRATT,
District Judge.

The Court: Attorneys may come forward for exceptions at this time.

(The following proceedings were had out of the presence and hearing of the jury):

Mr. Taylor: I think I am going to except to instruction number 9 I believe.

The Court: Number 9? Or 8?

Mr. Taylor: Nine, I think. Yeah. The court has instructed in 9 the definition of the word "wilfully" and also as to the word unlawfully where neither of the words appear in the information on file charging the crime. The only thing——

The Court: It can't hurt you.

Mr. Taylor: I was going to except to number 3 (a) upon the ground as to an attempt to commit the crime charged in the information, upon the grounds there was no attempt alleged in the information whereas the law relating to the unlawful use and

possession of narcotics contains a clause defining attempts to violate the narcotic law and then also, your Honor, I am going to except to——

The Court: Just a minute, Mr. Taylor.

Mr. Hepp: I would like to make a statement concerning that, your Honor. [109]

The Court: All right.

Mr. Hepp: And that is the law which counsel says defines an attempt. Actually it doesn't define an attempt but merely uses that word in defining fraud and deceit and an attempt to commit fraud and deceit. The section doesn't purport to define the law on attempt and is not consequently—doesn't have any bearing and I believe that matter was ruled on in the course of the trial as to the significance of that other section that is contained in the narcotic law.

Mr. Taylor: Let's see, I had one—4 (2), I except to the use of the word "believed" at the end of the first line thereof under the opinion that the word "knew that said package contained heroin, a narcotic drug." That "belief" wasn't founded upon the facts. I think it should be worded so that they had knowledge that the said package contained——

The Court: I believe "believed" is sufficient, don't you?

Mr. Hepp: She could certainly be guilty of an attempt of trying to possess it, if she believed it was in there, because in the very nature of things in something like that, your Honor, she couldn't know that the—— for instance a sender might have inadvertently left it out. I mean, she would have no way

of knowing what was inside of the package and to premise a conviction on that kind of proof is just impossible.

Mr. Taylor: That's all I have.

The Court: All right, it will be denied, overruled.

(The following proceedings were had in the presence and hearing of the jury)

The Court: The jury may retire in the custody of the bailiffs.

(At 11:40 a.m., the jury in charge of its sworn bailiffs retired to enter upon its deliberations.)

[Endorsed]: Filed June 25, 1951.

[Endorsed]: No. 13020. United States Court of Appeals for the Ninth Circuit. Leona Simpson, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the District Court for the District of Alaska, Fourth Judicial Division.

Filed July 20, 1951.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13020

LEONA SIMPSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS

The appellant states that the points upon which she intends to rely on this appeal are as follows:

1. That the Trial Court erred in overruling appellant's objections to questions asked by appellee at pages 13, 14, 15, 21, 23 and 25 of the Transcript of Trial as numbered by the official Court Reporter.

2. That the Trial Court erred in sustaining appellee's objection to question by appellant at page 53 of the said Transcript of Trial.

3. That the Trial Court erred in denying in part appellant's Motion for an Order Directing a Verdict of Acquittal and in refusing to direct a verdict at page 93 of said Transcript of Trial. The Motion made at the conclusion of appellee's case appears at pages 93 and 94 of said Transcript of Trial.

4. That the Trial Court erred in denying appellant's Motion for a Directed Verdict of Acquittal at page 96 of said Transcript of Trial. The Motion made after the defense had rested appears at page 95 of said Transcript.

5. That the Trial Court erred in denying ap-

pellant's exception to the Court's Instruction No. 3A at page 111 of the said Transcript of Trial. Instruction 3A is set out at page 98 of said Transcript and the Exception is made at page 109 of said Transcript.

6. That the Trial Court erred in overruling appellant's exception to the Court's Instruction No. 4(2) at page 111 of said Transcript of Trial. Instruction No. 4(2) is set out at page 99 of said Transcript and the Exception is made at page 109 of said Transcript.

7. That the Trial Court erred in denying appellant's Motion for Acquittal and, in the Alternative, For a New Trial. The Motion for Acquittal appears at page 34 of the original certified record. The Order denying said Motion appears at page 35 of said record.

8. That the Court erred in denying appellant's Motion for New Trial. The Motion For New Trial appears at pages 36-38 inclusive of said original certified record. The Order of Denial appears at page 39 of said original certified record.

9. The evidence was insufficient to justify the verdict.

10. The verdict was contrary to law.

/s/ WILLIAM V. BOGGESS,
WARREN A. TAYLOR,
Attorneys for Appellant.

Acknowledgment of Service attached.

[Endorsed]: Filed July 23, 1951. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION OF RECORD

To: The Clerk of the United States Court of Appeals for the Ninth Circuit:

The appellant hereby designates, by reference to the pages of the original certified record, the following portions of said record which are material to the consideration of this appeal:

Information, page 1.

Waiver, Arraignment, Plea and Setting for Trial, page 3.

Verdict, page 12.

Motion for Acquittal and, in the Alternative for a New Trial, page 33.

Order Denying Motion for Acquittal and, in the Alternative, for a New Trial, page 35.

Motion for New Trial with Accompanying Affidavit and Exhibit, pages 36-38.

Order Denying Motion for New Trial, page 39.

Sentence, page 40.

Judgment and Commitment, page 41.

Notice of Appeal, pages 42-43.

Designation of Record, page 48.

Transcript of Proceeding at Trial (pages 1 to 111 as numbered by the official Court Reporter).

All the Exhibits admitted in evidence at the Trial.

This Designation of Record and the Statement of Points filed therewith.

/s/ WILLIAM V. BOGGESS,
WARREN A. TAYLOR,
Attorneys for Appellant.

Acknowledgment of Service attached.

[Endorsed]: Filed July 23, 1951. Paul P. O'Brien,
Clerk.

No. 13,020

IN THE

United States Court of Appeals
For the Ninth Circuit

LEONA SIMPSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

WARREN A. TAYLOR,

WILLIAM V. BOGGESE,

Fairbanks, Alaska,

Attorneys for Appellant.

FILED

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PAUL P. O'BRIEN
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No. 13,020

IN THE

**United States Court of Appeals
For the Ninth Circuit**

LEONA SIMPSON,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

STATEMENT OF PLEADINGS.

Upon a plea of not guilty and a waiver of prosecution by indictment (T.R. 4), appellant was tried by jury in the District Court for the District of Alaska, Fourth Division, upon an information (T.R. 3) charging her with the felonious possession and control, within said Division, of a narcotic drug contrary to the provisions of Sections 40-3-2 and 40-3-20 of the Alaska Compiled Laws, Annotated, 1949. Jurisdiction in said District Court is vested by Title 48, U. S. Code, sec. 101 (48 U.S.C.A. sec. 101).

On the 16th day of May, 1951, the jury returned a verdict that the defendant was "guilty of attempting

to commit the crime set forth in the information * * *'' (T.R. 5). Successive motions by appellant for acquittal and, in the alternative for a new trial and for a new trial on the grounds of newly-discovered evidence, were denied by the Court below (T.R. 6-9). From the judgment of said Court entered on the 11th day of June, 1951 (T.R. 11-12), and its orders denying the above-stated motions, appellant appealed to this Court by notice duly filed on said 11th day of June, 1951 (T.R. 12-13).

This Court has jurisdiction to entertain this appeal by virtue of the authority conferred on it by Title 28, United States Code, Sections 41 and 1291.

ABSTRACT OF CASE.

As previously stated, appellant was convicted of an attempt (T.R. 5) to commit the crime of felonious possession and control of a narcotic drug as charged by the information (T.R. 3). It was appellant's contention at the trial of the cause and is appellant's contention on this appeal, that the information did not charge a crime for the attempted commission of which appellant could be tried and punished under Territorial Law. Upon this ground, appellant moved for a directed verdict of acquittal at the close of the evidence (T.R. 93), excepted to the trial Court's instruction to the jury on the general law of attempt (T.R. 105; Instruction 3 (a), T.R. 96), and moved for a judgment of acquittal and, in the alternative, for a

new trial after verdict (T.R. 6). In her alternative motion for a new trial, appellant sought reconsideration of the rulings of the Court upon her motion for a directed verdict of acquittal and exception to the Court's instruction. In every instance, the ruling of the trial Court was adverse and each of said rulings was assigned as error in the statement of points filed in this Court. (Statement of Points, Nos. 4, 5 and 7, T.R. 108-109).

As additional claimed error, appellant presents for review by this Court the propriety of certain evidentiary rulings made by the Court below.

In seeking to prove the charge stated in the information, the Government presented evidence which, if believed, showed that:

(1) A package containing a narcotic drug was consigned by Pan American carrier to a Mrs. Juanita Pearson, Fairbanks, Alaska.

(2) That, prior to delivery to the named consignee, the package was intercepted by a United States Treasury Agent at the Pan American Freight Office at Fairbanks, Alaska.

(3) That the appellant, Leona Simpson, wrote and signed the name of the consignee, Mrs. Juanita Pearson, to a note or "letter of authority" which she delivered to a cab driver so that he might pick up the package in question.

The error claimed is that the trial Court permitted secondary evidence as to the nature and contents of

the note over appellant's objections, without first requiring an identification of the note or a legally sufficient explanation of its non-production. The trial Court's action in denying appellant's objection to such secondary evidence was assigned as error in this Court (Statement of Points, No. 1, T.R. 108).

SPECIFICATION OF ERRORS.

1. The trial Court erred in denying appellant's motion for a directed verdict of acquittal at the close of the evidence (T.R. 93, 94), in overruling appellant's exception to the trial Court's instruction on the law of attempt, in denying appellant's motion for a judgment of acquittal (T.R. 6, 7) after verdict and denying appellant's alternative motion for a new trial (T.R. 6, 7) insofar as said alternative motion was based on the trial Court's refusal to direct a verdict and sustain appellant's exception.

The instruction complained of reads in full, as follows:

“The Law of Alaska provides that if any person attempts to commit a crime and in such attempt does an act toward the commission of such crime but fails or is prevented or intercepted in the perpetration thereof, such person, if proven guilty of such attempt beyond a reasonable doubt, shall be punished as provided by law.” (Instruction 3(a), T.R. 96).

In excepting to this instruction, the ground stated by appellant was: 1

“* * * upon the ground as to an attempt to commit the crime charged in the Information, upon the grounds there was no attempt alleged in the Information whereas the Law relating to the unlawful use and possession of narcotics contains a clause defining attempts to violate the narcotic law and then also, your Honor, I am going to except to * * *”.

The trial Court's denial of this exception and its other adverse rulings as previously set out in this specification bring before this Court for appellate review the question of whether or not an information charging felonious possession and control of a narcotic drug states a crime for the attempted commission of which appellant can be tried and convicted under Territorial Law.

2. The Court erred in overruling appellant's objections to the admission of testimony on appellee's direct examination of the witness, Power G. Greer, proceedings relating to which are, as follows:

“Q. What, if any, indicia of ownership or right or claim to the package was used in order to claim it?

A. The cab driver produced a note written by hand.

Mr. Taylor. If the Court please, I am going to object to any conversation or any testimony about this note unless the note is produced and identified, best evidence rule.

The Court. Objection overruled.

Q. (by Mr. Hepp). I am not sure that I caught all of your answer, Mr. Greer.

A. The cab driver produced a note written in hand.

Q. There—was there a signature on the note?

A. There was.

Q. Do you know what name purported to be—

Mr. Taylor. Just a moment, Mr. Greer. Your Honor, I am going to renew my objection. I think under the best evidence rule, the note itself is the best evidence and this would be under the hearsay rule, your Honor, and I think the absence of it should be certainly explained to the Court, and no further testimony should be made as to this note.

Mr. Hepp. I am glad to come forward with an offer of proof, your Honor.

The Court. Very well, then. Come forward.

(The following proceedings were had out of the presence and hearing of the jury):

Mr. Hepp. I will show with this witness and others—two other witnesses—that the note was misplaced or lost in the residence of the defendant and that if the note is presently possessed by anyone, it would be in the possession of the defendant and that being so, irrevocably lost insofar as it is the power of the prosecution to produce, I believe that secondary evidence of the same is admissible. I will show those things.

The Court. Have you made a demand on the defendant for it?

Mr. Hepp. No, I haven't made a demand.

Mr. Taylor. If they had something in their possession which was material evidence, it either can be construed that it was in favor of the defendant, or they are trying to conceal something. It would be prejudicial to allow them to testify as to the contents of this note since they do not have the note and it was material evidence, and I don't believe, your Honor——

Mr. Hepp. I don't feel so, not with four witnesses that saw the note and the witnesses are excluded, your Honor. I don't think there could be a travesty on justice in this case. We have no reason necessarily to believe that the defendant has this note. As I say, if it is possessed at this time, it would be in the house there because it was there when the search was made by the Treasury Agent and he never left the house with the note. He couldn't find it, but he left——

Mr. Taylor. He testified to the note from the taxi driver, your Honor, at the Pan Am office, and it would be highly prejudicial.

The Court. The objections will be overruled." (T.R. 25-27).

The witness, Power Greer, then testified in substance, that the note, which was presented at the Pan American office by a cab driver named Brazell (T.R. 25), bore the signature of Mrs. Juanita Pearson (T.R. 28). Previous testimony had established that the name Mrs. Juanita Pearson appeared as the addressee of a package containing narcotics, which the witness Greer had intercepted at the Pan American freight office (T.R. 22, 23). Greer then testified that he took cus-

tody of the note and accompanied the cab driver to a residence where appellant was identified as the person who had delivered the note to the cab driver (T.R. 33).

Appellant then renewed her objection:

“Q. What was the conversation, Mr. Greer?

A. After the cab driver had pointed out Leona Simpson as being the party that had given him the note, I had the note in my hand and I showed it to Leona Simpson and I asked her if she had written it. She replied that she had—

Mr. Taylor. Just a moment, your Honor. We are going to object to any further questions about the note unless it—there is some explanation given for its non-admission or marked for identification. Under the best evidence rule, the note itself is the best evidence, your Honor. I don't think he can testify to it unless it is shown where the note is.

The Court. Objection will be overruled.”
(T.R. 33).

The errors to be considered under this specification relate to the admissibility of secondary evidence as to nature, contents and circumstances surrounding an unproduced writing material to the Government's case. In each ruling set out above, it is submitted the Court erred for reasons which will be discussed in the argument under this specification.

ARGUMENT ON SPECIFICATION NO. 1.

Appellant was convicted of an attempt to feloniously possess and control a narcotic drug. It is appellant's position that such an attempt, if proven, does not constitute a crime under territorial law. Appellant's contention was characterized by the trial Court as "rather unusual" (T.R. 94). For an opportunity to prove the unusual, appellant has taken this appeal.

Since the evidence presented at the trial of the cause did not tend to prove a consummation of the crime charged, the case was submitted to the jury on the theory that appellant might be found guilty of an attempt to commit that crime under Section 65-2-5, ACLA 1949, the material portion of which is set out as follows:

"That if any person attempts to commit any crime, and in such attempt does any act toward the commission of such crime, but fails, or is prevented or intercepted in the perpetration thereof, when no other provision is made by Law for the punishment of such attempt, upon conviction thereof, shall be punished as follows: * * *"

This "general attempts section" had its origin as Section 192 of the Act of Congress of March 3, 1899, c. 429 (30 Stat. 1253), hereafter referred to as the Alaska Criminal Code, which Act established the "penal and criminal laws of the United States of America and the procedure thereunder relating to the District of Alaska".¹

¹The enacting clause of Chapter 429 reads as follows: "Be it enacted by the Senate and the House of Representatives of the

By new legislation not amendatory to said Alaska Criminal Code, the Uniform Narcotic Drug Act² was enacted into law by the 1943 session of the Territorial Legislature (Sess. Laws of Alaska, 1943, Chapter 6, Secs. 1-26, pp. 47-62.—Secs. 40-3-1 to 40-3-23, ACLA 1949).

Upon Section Two of this Act (Sec. 40-3-2, ACLA 1949), which provides in full as follows:

“It shall be unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense, or compound any narcotic drug, except as authorized in this Act”,

appellee based its information charging appellant with the felonious possession and control of a narcotic drug (T.R. 3).

From the foregoing analysis, the question to be determined by this Court may be stated as follows: Can appellant's conviction be sustained where that conviction necessarily rests on the applicability of the “general attempts section” as set out in the Alaska Criminal Code enacted by the Congress of the United States for the District of Alaska, to a crime defined and created by the Territorial Legislature in an Act which is not amendatory to that Criminal Code?

United States of America in Congress assembled, that the Penal and Criminal laws of the United States of America and the procedure thereunder relating to the District of Alaska, shall be as follows:”

²Section 25 of the Act provides: “This Act may be cited as the Uniform Narcotics Drug Act.”

Congress, of course, intended that the “general attempts section” apply only to those crimes set out in the Alaska Criminal Code. At the time of the code’s enactment no legislative body had been ordained for Alaska with power to define crimes and provide for their punishment.³ Assuming that Congress had in mind the eventual admission of Alaska to Territorial status and the creation of a territorial legislature to be vested with such power, it is still apparent that Congress intended to confine the operation of the section in controversy to crimes contained in that code. Such intent is evident from Section 2 of that code, which provides as follows:

“That the crimes and offenses defined in this Act, committed within the District of Alaska, shall be punished as herein provided.” (Sec. 65-1-2 ACLA 1949).

“The crimes and offenses defined in this Act” are those crimes contained in the Alaska Criminal Code as enacted by Congress.⁴ Since the “general attempts section” is a part of that Code and since one of its functions is to prescribe punishment, it is obvious that the criminal attempts contemplated by that section are attempts to commit the substantive crimes and offenses defined in the code.

Of course, legislation couched in general terms, as is the “general attempts section”, may be progressive

³The creation of a Territorial Legislature was not permitted until August 24, 1912. 37 Stat. 512.

⁴The Act created a comprehensive criminal code defining some 174 substantive crimes.

in application or operation. Such progressive application would have resulted had Congress elected to amend the code by defining a new crime or crimes. By virtue of the Organic Act (37 Stat. 512, approved August 24, 1912), the same avenue of amendment was open to the Territorial Legislature. Section 3 of that Act provides, in part, as follows:

“* * * that except as herein provided all laws now in force in Alaska shall continue in full force and effect until altered, amended, or repealed by Congress or by the Legislature” (Sec. 2-1-1, ACLA 1949).

But in enacting the Uniform Narcotics Drug Act, the Territorial Legislature did not choose to amend the Alaska Criminal Code by incorporation of that Act. Since that code has not been repealed by Congress or by the Territorial Legislature, it is still an Act of Congress in “full force and effect” within the Territory of Alaska; and, the incontrovertible intent to be deduced from its express terms is that the criminal attempts proscribed are attempts to commit the crimes contained in that Act. The progressive application of the “general attempts section” contemplated at the time of its enactment was to crimes newly defined by congressional amendment of the code. The passage of the Organic Act, *supra*, broadened the intended scope of progressive application to cover crimes newly defined by territorial amendment of that code. But nowhere in that code or elsewhere even by indulgence in the most gross fiction can be found any indication of an intent that the “general attempts section”

should be made applicable to original acts defining new crimes.

The intent of the enacting body, in this instance the Congress of the United States, should, of course, be controlling; but even were it thought for a moment that, present intent on the part of the Territorial Legislature, the application of the "general attempts section" could be extended by implication to new crimes defined by the Territorial Legislature without reference to the Alaska Criminal Code, such a bit of legal legerdemain would avail appellee nothing in the instant case.

Aside from the inference which may be drawn as to the nonexistence of such intent from the failure of the Territorial Legislature to incorporate the Uniform Narcotics Drug Act in the Alaska Criminal Code by amendment, there is still other evidence that the said Legislature did not contemplate any such offense as attempted felonious possession and control of a narcotic drug.

The Uniform Narcotic Drug Act as indicated in the title⁵ is comprehensive legislation designed to regulate and control the manufacture, possession, sale, prescription, administration, dispensation and compounding of narcotic drugs.

Uniformity of decision and identity of statute among the various jurisdictions constituting the pri-

⁵An Act to regular (sic) and control the manufacture, possession, sale, prescription, administering, dispensing and compounding of narcotic drugs, providing penalties for the violation of any provision thereof and repealing Sections 1270, 1271, 1273 and 1275.

mary object of uniform laws⁶ when coupled with a consideration of the minute particularity⁷ and the broad scope of conduct and activities sought to be regulated by the Uniform Narcotic Drug Act,⁸ leads one inevitably to the conclusion that the Legislature intended that Act to occupy the entire regulatory field on the subject of illegal traffic in narcotics.

Such a conclusion was reached by an Oklahoma Appellate Court in *Rich v. State* (1937), 61 Okla. Crim. Rep. 148, 66 P. (2d) 950, in holding that a prior statute on illegal transportation of narcotic drugs was repealed by enactment of the Uniform Narcotic Drug Act although that prior statute was not inconsistent with the terms of said Act.

Said the Oklahoma Court at page 953 of the Pacific Reporter:

⁶Section 23 of the Act (Sec. 40-3-22 ACLA 1949) reads as follows: "This Act shall be so interpreted and construed as to effectuate its general purpose, to make uniform the laws of those States and Territories which enact it." According to the compilers of American Jurisprudence, the Uniform Narcotic Drug Act was in force in 1940 in at least forty-one States and Territories. 17 *Am. Jur.* 1950 Cumulative Supplement, Sec. 5.1, p. 136. "The principal object of Uniform State Laws is to provide, as far as possible, uniform laws on the subjects involved that would be common to all the States adopting them. They are adopted to remove doubts as to the controlling rules of law on the subjects involved, and are intended to secure not only identity of statute but also uniformity in decision." 50 *Am. Jur.*, Sec. 42, p. 60.

⁷Said the West Virginia Appellate Court in *State v. Hinkle* (1946), 129 W.Va. 393, 41 SE(2d) 107, 109, of the purpose of enacting the Uniform Narcotic Drug Act: "* * * for the purpose of dealing with narcotic drugs in a comprehensive manner and of regulating the subject matter of the statute in specific and minute particulars and in painstaking detail."

⁸For an excellent synoptic discussion of the scope of the Uniform Narcotic Drugs Act, see 17 *Am. Jur.* 1950 Cum. Supp., Sec. 5.1, p. 136, cited supra, footnote 6.

“In this connection we think the Defendant is correct. From the statement of the Act set forth it will be readily seen that the Act of May 14, 1935, was a ‘Uniform Drug Act’. This is shown by the title of the Act and the different provisions thereof. Sec. 12 of the Act (63 Okl. St. Ann. Sec. 412) regulates the transportation of drugs, and had it been the intention of the Legislature for it to have been an offense to transport narcotic drugs under said Act, they would have undoubtedly so expressed it. Section 2 of said Act (63 Okl. St. Ann. Sec. 402), quoted above, does not provide that it shall be unlawful to transport narcotic drugs and had the Legislature intended to make it an offense they would have evidently incorporated it in Section 2 of said Act. It is evident that the legislature was of the opinion that the Act itself was comprehensive enough to adequately protect the State and its citizens against the illegal traffic of narcotic drugs, and to have a narcotic drug law uniform with the other States of the Nation * * *’.

Reasoning by analogy from the holding in the *Rich* case, it is equally apparent in the instant case that had the Territorial Legislature elected to make criminal an attempt to feloniously possess and control a narcotic drug, it could have so provided in Section 2 of the Uniform Act, *supra*.

Still another avenue to create such a criminal attempt was open to the Territorial Legislature. Section 17 of the Act (Sec. 40-3-17, ACLA 1949) enu-

merates certain unlawful attempts.” This enumeration of such attempts without more is an index to legislative intent that they are the only attempts with respect to narcotic drugs, to be punishable at law. The mere inclusion of a catch-all phrase in said section such as “all other attempts to obtain or possess narcotic drugs otherwise than as permitted by this Act” would have been sufficient to create an offense under which a jury might convict this appellant.

As has been previously pointed out, there were several methods by which the Territorial Legislature could have created the substantive offense of an “attempt to feloniously possess and control a narcotic drug”. The only logical inference to be drawn from their failure to do so is that they did not intend to create such an offense. Furthermore, to state that they impliedly intended the “general attempts section” of the Alaska Criminal Code to be applicable to Section 2 of the Uniform Narcotic Drug Act, *supra*, would invite frustration of one of the principal objects of the Act: uniformity of decision. Whether or not an attempt to feloniously possess and control a narcotic drug in violation of Section 2 of the Uniform Narcotic Drug Act would constitute a criminal attempt in a given jurisdiction would turn on many factors, such as, whether or not the Act was a part of the Criminal

⁹“No person shall obtain or attempt to obtain a narcotic drug, or procure or attempt to procure the administration of a narcotic drug, (a) by fraud, deceit, misrepresentation, or subterfuge; or (b) by the forgery or alteration of a prescription or of any written order; or (c) by the concealment of a material fact; or (d) by the use of a false name or the giving of a false address.”

Code, if any, or particular wording of the attempts statute, if any.

As far as appellant can ascertain there has been but one case where a conviction of an attempt to violate Section 2 of the Uniform Act has been before an Appellate Court for review. That case, *State v. Broadnax* (1950), 216 La. 1003, 45 So. (2d) 604, arose in Louisiana. As in the instant case, the Uniform Act was not incorporated in the Criminal Code of Louisiana. In sustaining the conviction, however, the Louisiana Court found ample evidence that the "general attempts section" was intended by the legislators and redactors of the code to be applicable to new crimes created by the Legislature and not forming a part of that code.

This evidence consisted of an express article of that code providing as follows (p. 609 of Opinion as printed in Southern Reporter) :

"A crime is that conduct which is defined as criminal in this Code, or *in other Acts of the Legislature*, or in the Constitution of this State." (Italics by Court),

and the comments printed as footnotes to the "attempt" article (which, under Louisiana law have sanction and may be taken into consideration in determining the construction of a particular article) appearing at page 609 of the Reporter opinion, as follows:

"Louisiana statutes covered: *Before the adoption of the Criminal Code* Louisiana had no general statute punishing *all attempts* to commit crimes". (Italics by Court).

In the instant case no such evidence of an intent to make the "attempts section" applicable to crimes not contained in the Alaska Criminal Code as enacted by the Congress of the United States, appears from that code. To the contrary, as previously pointed out, the manifest intent of Congress as ascertained from that code is to confine the operation of the "general attempts section" to crimes defined in that code.

It is to be noted that the approach of the Court in the *Broadnax* case was to treat the intent of the redactors of and legislators of the code as controlling, which is, of course, correct. As far as the intent of the Legislature in enacting the Uniform Narcotic Drug Act was concerned, the Louisiana Court's attitude was negative. The Court could find no positive intent that the "Attempts" provision of the Louisiana code be made applicable to violations of Section 2 of the uniform law. When confronted with the argument that the specific attempts enumerated in Section 17 of the Narcotics Act indicated legislative intent not to make the "attempts" article applicable, the Court could only state, at page 410 of the opinion as printed in the Southern Reporter:

"We do not agree that Section 17 shows any intention of the redactors of the Code to exclude Section 2 of the Uniform Narcotic Drugs Act from the application of Article 27.

The Louisiana Court did not find any intent that the enactors of the Uniform Narcotic Drug Act intended the "attempts" article to be applicable to Sec-

tion 2 of that Act. The uniform nature and the comprehensive scope of the Drugs Act, if it had been considered by the Louisiana Court, would have indicated a positive intention that the "attempts" article not be made applicable. Nor, as has been previously pointed out, does appellant agree with the Louisiana Court in its negation of the intent evidenced by the specific enumeration of offenses in Section 17 of the Uniform Act. We agree rather with the dissenting opinion of Justice Hamiter as expressed in a statement contained in that opinion appearing at p. 610 of the Southern Reporter:

"The offense of attempted possession of a narcotic drug may be committed only under circumstances (they are not present here) described in Section 17 of the Uniform Narcotic Drugs Act".

Even were it determined by this Court, in the instant case, that the "general attempts section", as contained in the Alaska Criminal Code, is applicable to new crimes created by the Territorial Legislature and not incorporated by amendment in that code, it is appellant's contention that such section would not be applicable to the specific crime involved in this case.

By the express terms of the "general attempts section", it is applicable only "when no other provision is made by law for the punishment of such attempt". The evidence introduced at the trial of this cause, if believed, would establish that appellant authorized a cab-driver, by a note written by her and signed with a name not her own, to pick up a package containing

narcotics at the Pan American Carriers office, which package was addressed with the same name as that signed to the note; that the cab-driver presented the note at the Pan American office but never obtained the package which was then in the possession of and remained in the possession of a United States Treasury agent. If this evidence as summarized tended to prove any offense, it was that of attempting to obtain a narcotic drug by fraud, deceit, misrepresentation, or subterfuge, as proscribed by Section 17 of the Uniform Narcotic Drugs Act, (Sec. 40-3-17, ACLA 1949) which provides as follows:

“No person shall obtain or attempt to obtain a narcotic drug; or procure or attempt to procure the administration of a narcotic drug, (a) by fraud, deceit, misrepresentation, or subterfuge; or (b) * * *”. (Also quoted, *supra*, footnote 9.)

Subparagraph 7 of the section just quoted, provides as follows:

“The provisions of this Section shall apply to all transactions relating to narcotic drugs under the provisions of Section 8 of this Act, in the same way as they *apply to transactions under all other Sections.*” (Italics by appellant.)

Section 20 of the Uniform Narcotic Drugs Act (Sec. 40-3-20 ACLA 1949) sets out the penalties to be attached to any violation of the Act.

Since the criminal conduct, if any, which appellee's evidence tends to prove is a violation of Section 17 of the Act, and since punishment for such conduct is

provided for by Section 20 of said Act, it is submitted that there is *another provision at law for the punishment of such attempt*, which makes the "general attempts section" inoperative by its express terms.

Furthermore, by virtue of the italicized language in subparagraph (7) of Section 17, above quoted, legislative intent is expressed that Section 17 shall be applicable to all transactions under the Act, including necessarily Section 2 for the violation of which appellant was tried. Section 17, it is submitted, when read together with Section 2, should make it clear that the only attempts to violate Section 2 which are punishable at law are those attempts provided for in Section 17.

In *Minter v. State* (1942) 75 Okl. Cr. 133, 129 P. (2d) 210, a situation, analogous to that in the instant case, confronted the Oklahoma Appellate Court. Defendant had been indicted for attempted murder under the "general attempts section" of the Oklahoma Code, which is substantially identical with that contained in the Alaska Criminal Code. The evidence induced at the trial of the cause tended to show that defendant was guilty of wilfully mingling poison with food with the intent that the same be taken by a human being to his injury, which conduct was specifically proscribed by another Criminal Statute of Oklahoma.

In holding that the indictment was improperly laid on the "attempts section" and should have been brought under the "Poison Statute", the Court stated at page 212 of the Reporter:

“In addition to this statutory provision, the latter part of Section 1822, O.S.1931, supra, under which this action is brought, provides: * * * where no provision is made at law for the punishment of such attempt * * *. There was a Statute specifically providing for acts such as were alleged to have been committed by Defendant, and under the plain terms of the provision above quoted, the charge should have been filed under the specific Statute and not under the terms of Section 1822, O.S. 1931.”

The additional “statutory provision” referred to provided, in effect, that, where the penal code and any other chapter of the laws of that State made the same act criminal, the other chapter should control. In view of the language just quoted, the Oklahoma Court would have reached the same conclusion without the aid of that “statutory provision”.

The result reached in the *Minter* case should be compared with that obtained in the California case of *People v. Marks* (1914) 24 Cal. App. 610, 142 P. 98. In this latter case defendant was charged with pandering and convicted of attempted pandering. Defense counsel contended that the pandering statute (which is not set out in the opinion) contained several sections which embraced the conduct for which defendant was found guilty of an attempt, and which created distinct substantive crimes for which defendant could be convicted. In rejecting defendant’s contention, the California Court states at pages 99 and 100 of the opinion as printed in the Reporter:

“we think that the language of Section 664, ‘* * * where no provision is made by law for the punishment of such attempts * * *’ applies exclusively, and must be confined to ‘attempts’ designated by statute as such, and does not refer generally to acts done in the attempt to commit the crime, and which, if done without relation to the offense, might be separately punished.”

The Oklahoma and California Courts are at odds as to the proper construction to be placed on the statutory phrase “where no provision is made at law for the punishment of such attempt”. According to the California Court in the Marks case, *supra*, the “general attempts section” is operative unless there is another statute defining the attempt and providing for its punishment. The California Court does not decide whether such statute must spell out specifically an attempt to commit the particular crime with which a defendant is charged. Left undecided is the result that would be reached were there, as in the instant case, another statute couched in terms of an attempt which would embrace the conduct for which a defendant is found guilty under the “general attempts section”.

The Oklahoma Court, giving an unstrained and natural construction to that statutory phrase, decided that the “general attempts section” was inapplicable wherever other provision was made a law for the punishment of the defendant’s conduct regardless of whether or not such other provision defined a substantive crime in terms of an attempt. The Oklahoma case, of course, supports appellant’s contention

that the specification by Section 17 of the Uniform Narcotic Drugs Act of certain attempts which would embrace appellant's alleged criminal conduct makes inoperative the "general attempts section" because *there is a provision at law for the punishment of such attempt*. The California Court leaves undecided the specific question confronting this Court, but may be considered as authority in support of appellant's position if the statement, "applies exclusively and must be confined to attempts designated by statute as such", as contained in that Court's Opinion, means any attempt, defined as such, and embracing the alleged criminal conduct, regardless of whether or not such attempt is specifically to commit the crime charged.

On the basis of the foregoing authorities and argument, it is submitted that the cause should be reversed and remanded and the trial Court directed to enter a judgment of Acquittal for appellant.

ARGUMENT ON SPECIFICATION NO. 2.

The question here involved actually encompasses three subquestions, each of which must be answered before a determination can be made of whether or not appellant has been prejudiced by the admission of secondary evidence of a certain note, as set out in Specification of Error No. 2.

Those sub-questions may be phrased as follows:

1. Did the Court err admitting evidence of the contents of the note in the first instance without requiring any explanation of its absence?

2. Was the offer to prove loss made by the Government sufficient to justify the conditional admission of secondary evidence?

3. If not, does the record show that a sufficient predicate was established to permit secondary evidence of the note to stand?

The answer to the first sub-question must be in the affirmative. No serious question can be raised that the note was not directly material to the issues. If attempt there was, it rests in the delivery by appellant of this "letter of authority" to the cab driver. As such material evidence, it falls squarely within the best evidence rule. When the witness, Power G. Greer, was asked

"What, if any, indicia of ownership or right of claim to the package was used in order to claim it?" (T.R. 25),

the Government was seeking testimony as to the contents of the note in question. Only an examination of its contents would show whether or not it was an "indicia of ownership or right of claim to the package." The witness so understood the question, for he answered:

"The cab driver produced a note written by hand." (T.R. 25.)

With the Government's intention made manifestly certain by this answer, appellant objected on the grounds of the best evidence rule. (T.R. 26.) The trial Court obviously erred in overruling this objection. (T.R. 26.)

As stated in 20 Am. Jur. sec. 403, p. 364:

“It is an elementary principle of the law of evidence, that the best evidence of which the case in its nature is susceptible, and which is within the power of the party to produce, or is capable of being produced, must always be adduced in proof of every disputed fact. Secondary evidence is never admissible unless it is made manifest that the primary evidence is unavailable, as where it is shown that it has been lost or destroyed, is beyond the jurisdiction of the Court, or is in the hands of the opposite party who, on due notice, fails to produce it. * * *”

Before endeavoring to answer sub-questions 2 and 3, it will be necessary to review the pertinent authorities and consider the facts of this case in light of those authorities.

A general statement of the applicable law is contained in 20 Am. Jur. sec. 441, p. 393, as follows:

“In order to introduce secondary evidence of an instrument which is claimed to have been lost or destroyed, the proponent of such secondary evidence must show that he has in good faith exhausted, in a reasonable degree, all sources of information and means of discovery, which the nature of the case would naturally suggest, and which were accessible to him. The Court should be fully informed of the facts showing the diligence used in making the search. In many instances, secondary evidence has been excluded because the details were not sufficiently proved. A general statement that diligence has been used or a mere perfunctory showing of some diligence, will not suffice.

“The contents of a lost instrument cannot be proved unless it appears that reasonable search has been made in the place where the document was last known to have been and, if not found there, that inquiry has been made of the person last known to have had its custody. If it is shown to have been in a particular place or in the custody of a particular person, that place should be searched or the person in whose custody it is shown to have been should be produced, or, if he is dead, his successor should be called.

“A reasonable search or one which shows reasonable probability of loss of the instrument is sufficient; it need not appear that every possible search has been made. Of course, no absolute rule can be laid down which will define what search shall be considered as a search prosecuted with reasonable diligence. The degree of diligence which shall be considered necessary, in any case, will depend on the circumstances of the particular case, as, for example, the character and importance of the paper, -its value, the purpose for which it is proposed to be used, and the place where a paper of that kind is most likely to be found. In other words, proof of search and proof of loss are always proportionate to the character and value of the papers supposed to be lost.”

In *Jernigan v. State* (1887), 81 Ala. 58, 1 So. 72, the following statement of the applicable rule was made:

“In accounting for the absence of a writing, material testimony in the cause, so as to let in secondary evidence of its contents, no universal

rule can be declared which will be applicable to every case. The testimony is addressed to the presiding Judge, and he pronounces its sufficiency. He must be reasonably convinced that it has been destroyed, is lost, or is beyond the reach of the Court's process. A material inquiry in such cases is whether or not there was a probable motive for withholding the highest and best evidence. Whenever the Court is able to answer this inquiry in the negative, less evidence will satisfy its conscience than if suspicious circumstances attended the transaction. As a rule, there must be a careful search at the place at which it was last known to be, if its place of custody can be traced or remembered. If not, then such search must be made at any and every place where it would likely be found. * * *"

The requirement that predicative proof be more stringent where primary evidence has been lost under suspicious circumstances has been approved by the Michigan Court in *People v. Lange* (1892), 90 Mich. 454, 51 N.W. 534.

That the rule is a variable one with the inquiry or search to be directed to all sources of information and means of discovery which the nature of the case would reasonably suggest, see *Leake v. State* (1921), 149 Ark. 621, 233 S.W. 773.

In light of the foregoing authorities, it is submitted that the answer to sub-question 2, "Was the offer to prove loss, made by the Government, sufficient to justify the conditional admission of secondary evidence?" must be in the negative. Consider-

ing all the statements of the United States Attorney together made in his offer to prove, at pages 26 and 27 of the record, it may be concluded that all that was offered was that the note was lost, that a search was made but the note wasn't found and that four witnesses saw the note. No offer was made to prove the nature and extent of the search or that due diligence was employed in making the search. Nor would the number of witnesses who had seen the note have any effect on the requirements of the rule as to the employment of reasonable diligence in the search for a lost instrument. Secondary evidence as to the contents of a written instrument through the testimony of a dozen witnesses is no substitute for primary evidence and the absence of the primary evidence must be first explained. It is clear therefore that the offer to prove did not measure up to the requirements of due diligence as set out in the quoted authorities and that the Court erred in accepting an insufficient offer to prove and permitting the introduction of such secondary evidence.

A further error should be discussed. Although, concededly, the order of proof is vested in the discretion of the Court, it would appear that there has been an abuse of that discretion in the instant case. The Government gave no explanation, reason or necessity why the usual order of proof could not be followed by requiring predicative evidence of loss before allowing testimony concerning the nature and contents of the note in question. Certainly, requiring such usual order of proof is of assistance to the trial

Court in reaching a sound judicial determination of whether or not a sufficient predicate has been established. The evidence with respect to this predicate is presented at one time, rather than on scattered occasions throughout the proceedings. The attention of the trial Judge can thus be focused on one issue which can determine without hindrance from the diversion present through other issues and evidence.

The answer to the third sub-question must also be in the negative. No sufficient predicate as to loss was ever established by the Government to correct the trial Court's error in the admission of secondary evidence over appellant's objection.

Power G. Greer, a Treasury Agent with twenty years experience, (T.R. 19) testified, on direct examination, with respect to the loss of the note, as follows:

Q. I would like to ask another question or two, Mr. Greer, concerning this note that you have testified to. Do you know where that note is, Mr. Greer?

A. No, sir; I do not.

Q. When did you last see that note?

A. Last time I saw it was in the home of Leona Simpson when it was folded up and placed under the string that wrapped the package and contained the heroin.

Q. Now, in relation to this—the period of time during which this conversation took place that you have testified to, when did you see that note last in relation to that conversation?

A. Well, it was some few minutes thereafter. I placed the box and the note on the table in the

kitchen or the front room of the home, after I told Leona that she was under arrest and had to come with us. She stated she had to dress, which she did, and we were there approximately thirty minutes.

Q. Are you able to explain to this jury what happened to that note?

A. I have an opinion.

Mr. Taylor. We object to an opinion, your Honor.

Mr. Hepp. I will refuse that answer.

Q. (By Mr. Hepp). Of your own knowledge, can you explain where that note is or what became of it?

A. No, sir.

Q. Did you make a search about your person or other places for that note before you left the premises of Leona Simpson, Mr. Greer?

A. I did, sir.

Q. Did you find it or any trace of it?

A. No, sir.

Q. And you are presently unable to produce that note?

A. No, sir.

Q. Did you understand that question? I say, you are presently unable to produce that note?

A. That's correct. I do not have it. I don't know where it is.

On cross-examination, it was established (T.R. 47) that four persons, in addition to the witness, were present at the residence of appellant when the note was lost. Those persons were, the United States Marshal McRoberts, the cab driver who had called at the Pan American freight office for the package, appellant and a "girl named Betty Austin". The

witness Greer testified, in substance, that he had asked Marshal McRoberts whether or not he had the note and had asked the cab driver whether or not he had seen it, to both of which inquiries he had received a negative reply. He further testified that he had looked for the note in the drawers of a night stand next to the bed but not through the drawers of a dresser in the bedroom. (T.R. 49.)

On direct examination, the United States Marshal McRoberts testified that he did not have the note and in response to a question as to its whereabouts, replied: "No, I don't. Mr. Greer lost it at the time, or mislaid it, or something." (T.R. 62.) On cross-examination, it developed that if any search were made by the Marshal McRoberts, it was for narcotics, and that the witness, Greer, asked him if he had the note when they were ready to leave the premises. (T.R. 66.)

The foregoing review of the record is a statement of the entire evidence presented on the subject of the note's loss. Even aided by the cross-examination of appellant, the Government fell far short of the burden imposed by law of showing that a search for the lost note was made with due diligence. The most that can be inferred from the evidence is that a search was made. Whether the search was thorough or perfunctory, careless or diligent, is not evident from the record. Certainly, the circumstances surrounding the loss of the note would indicate that inquiry should have been addressed to the woman, Betty Austin, who was present at the premises when the note disappeared. But even were this not re-

quired, the details of the search were not sufficiently delineated to enable any judge to find that due diligence was exercised in the search for the note.

Indeed, the loss of the note before the eyes of a Treasury Agent in the company of a United States Marshal is such a suspicious circumstance as should cause a trial court to exact a strict showing of due diligence. The preservation of material evidence by Officers of the United States entrusted with the enforcement of its law is of the gravest importance to the end that those laws be enforced. It is equally important to defendants that such evidence be preserved. If one is to be convicted, he must be convicted by competent and material evidence—the best evidence available. One's freedom should not be made to turn on the accuracy of another's memory where carelessness alone has made testimony from memory necessary. One's credulity must be elastic to accept as fact the loss of a note by a Treasury Agent with twenty years experience in the Department. The inference is ever so subtly present that such loss was convenient. If not convenient in the instant case, may it not be convenient in future cases? If your material, physical evidence is weak, of little probative force or effect, or if its contents are, in some respects, indicative of a defendant's innocence—the remedy is simple: lose it. The gate is then open for the fabrication of non-physical evidence—the testimony of the investigating officer concerning the loss of evidence.

Nor can we be so naive as to imagine that evidence is never fabricated. Overzealous prosecutors, willing

to substitute their judgment for that of law and intolerant of the law's exaction with respect to evidence, have and will fabricate evidence.

Considering the suspicious, almost unbelievable circumstance under which the note disappeared in the instant case, motive may have existed which made the loss convenient. Since the appellant's name was not the same as that appearing on the package containing the narcotics as the consignee, the note may have indicated that appellant was acting as agent of the named consignee. It is certainly significant to note, in this connection, that the Government never asked any witness to testify as to the precise contents of the note from his best recollection. The United States Attorney obtained evidence of its nature without revealing evidence as to its precise contents, by always asking each witness, in effect, whether or not the cab driver presented any indicia of ownership, or claim, or right to the package containing the narcotics. (T.R. 25, 59, 74.)

On the previously cited authorities and upon the record, it is submitted that the cause should be reversed and remanded, with a mandate to the trial Court to order a new trial.

Dated, Fairbanks, Alaska,

December 7, 1951.

Respectfully submitted,

WARREN A. TAYLOR,

WILLIAM V. BOGGESS,

Attorneys for Appellant.

Receipt of copy of foregoing typewritten brief acknowledged this 29th day of November, 1951.

EVERETT W. HEPP,

*United States Attorney, Fourth
Division, Territory of Alaska
and Attorney for Appellee.*

No. 13,020

IN THE

United States Court of Appeals
For the Ninth Circuit

LEONA SIMPSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR THE UNITED STATES.

EVERETT W. HEPP,

United States Attorney,

HUBERT A. GILBERT,

Assistant United States Attorney,

Fourth Judicial Division, Territory of Alaska,

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FILED

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No. 13,020

IN THE

**United States Court of Appeals
For the Ninth Circuit**

LEONA SIMPSON,

VS.

UNITED STATES OF AMERICA,

Appellant,

Appellee.

BRIEF FOR THE UNITED STATES.

JURISDICTION.

This is an appeal from a judgment of the District Court for the District of Alaska, Fourth Judicial Division, sentencing the defendant to be confined in the Federal Reformatory for Women at Alderson, West Virginia, for a period of two (2) years. Said judgment was entered on the 11th day of June, 1951 (T.R. 11-12) pursuant to a jury trial and a verdict of "not guilty of the crime charged in the information in this case * * * guilty of the crime of attempting to commit the crime set forth in the information filed in this cause, to-wit: the crime of feloniously having possession and control of heroin, a narcotic drug" (T. R. 5), based on Sections 40-3-2 and 40-3-20 and 65-2-5 of the Alaska Compiled Laws Annotated, 1949. Notice of

appeal was filed on the 11th day of June, 1951 (T.R. 12-13). The jurisdiction of the District Court was invoked under the Act of June 6, 1900, Chapter 786, 31 Stat. 322, as amended (48 U.S.C. Sec. 101). The jurisdiction of this Court is invoked under Sec. 128 of the Judicial Code as amended (28 U.S.C. Sec. 255 (a), now 28 U.S.C. New, Sections 1291, 1294).

STATEMENT OF THE CASE.

Mr. Power G. Greer, U. S. Treasury Department Agent, as a result of a telephone conversation with an anonymous informer, went to the Pan American World Airways office in Fairbanks, Alaska, on February 9, 1951 to inspect the contents of a package at said office, consigned to Juanita Pearson (T.R. 18, 19, 20, 40). Mr. Greer obtained the package addressed to Juanita Pearson from a Mr. Harris at the Pan American office, opened it, and found that it contained a white substance which he believed to be a narcotic drug (T.R. 19, 20, 21, 22, 23, 40, 41). Mr. Greer then, on February 9, 1951 took the white substance to the chemical laboratory, Ladd Air Force Base (Alaska), and there had Dr. Bouden make an analysis of a small portion of it (T.R. 23, 42). The remainder of the white substance was then sent a day or so later by Mr. Greer, to the Alcohol Tax Unit, U. S. Treasury Department, Seattle, Washington, where it was received and chemically analyzed by Mr. Hugo Ringstrom, a chemist in said Alcohol Tax Unit (T.R. 24, 85, 86). Mr. Ringstrom found from his analysis,

that the substance consisted of 358 grains of heroin, a narcotic (T.R. 86, 87).

James R. Brazell, a cab driver for Checker Cab, received a call on February 10, 1951 to proceed to 642 4th Street in Fairbanks, Alaska. When he reported to 642 4th Street, Leona Simpson handed him a note, told him to take it to Pan American cargo office and get a package for her there (T.R. 70, 71). Mr. Brazell took the note to the Pan American Cargo office, gave it to an employee, and Mr. Greer and U. S. Marshal Theodore R. McRoberts came up to Brazell from a back room. Greer and McRoberts asked Brazell where he got the note and if the address was the same as the one of the package which they held in their hands. Brazell told them the address on the note and package were different from the one where he got the note; that he got the note at 642 4th and was to take the package to 642 4th (T.R. 25, 28, 70, 71, 75).

Greer and McRoberts instructed Brazell to take them where he had got the note and he took them to 642 4th Street (T.R. 28, 59, 60, 66, 71).

When they arrived at 642 4th the door was open and Leona Simpson and Betty Austin were standing inside the room (T.R. 29, 33, 60, 71).

Mr. Greer asked Brazell which woman had given him the note and Brazell pointed out Leona Simpson (T.R. 29, 61).

Mr. Greer held the note in his hand and asked Leona Simpson if she had written it, to which she replied "Yes" (T.R. 33, 61).

Mr. Power Greer then asked Leona Simpson if she had given the note to the cab driver and she said "Yes" (T.R. 34).

Greer then said, "Well, here's your package", to which Leona Simpson replied, after some hesitation, "It isn't my package. I was going to get it and keep it for someone" (T.R. 34, 61).

Greer next asked Leona Simpson if she would tell him who the person was that she was to keep it for, but she never replied although he then informed her that the package had contained narcotics (T.R. 34, 35, 61).

Leona Simpson was then placed under arrest by Power Greer and, after about thirty minutes, she, Greer and McRoberts started to leave the house. Prior to leaving the house, Greer discovered that the note, which he had shown to Leona Simpson, was missing (T.R. 37, 38, 39, 62).

It was quite obvious at the conclusion of the government's case that neither the defendant nor her agent, the cab driver, had actual possession and control of the narcotic. It was equally obvious that an attempt had been made by the defendant through her unwitting agent to possess and control a narcotic drug, to-wit, heroin. This attempt was thwarted when the Treasury Agent intercepted the package containing the narcotic. The government argued that the lesser offense of attempt had been committed and that the case should go to the jury. The defendant introduced no evidence in her behalf. The Court instructed

the jury that it could find the defendant guilty of a lesser included offense of attempt under the general attempts statute of the Territory of Alaska.

QUESTIONS PRESENTED.

1. Whether the trial Court erred in denying appellant's motion for a directed verdict of acquittal at the close of the evidence (T.R. 93, 94); in overruling appellant's exception to the trial Court's instruction on the law of attempt; in denying appellant's motion for a judgment of acquittal (T.R. 6, 7) after verdict; and denying appellant's alternative motion for a new trial (T.R. 6, 7) insofar as said alternative motion was based on the trial Court's refusal to direct a verdict and sustain appellant's exception.

The instruction complained of reads in full as follows:

"The Law of Alaska provides that if any person attempts to commit a crime and in such attempt does an act toward the commission of such crime but fails or is prevented or intercepted in the perpetration thereof, such person, if proven guilty of such attempt beyond a reasonable doubt, shall be punished as provided by law." (Instruction 3(a); T.R. 96.)

In excepting to this instruction, the ground stated by appellant was:

"* * * upon the ground as to an attempt to commit the crime charged in the information upon the ground there was no attempt alleged in the

information whereas the law relating to the unlawful use and possession of narcotics contains a clause defining attempts to violate the narcotic law and then, also, Your Honor, I am going to except to * * *"

The trial Court's denial of this exception and its other adverse rulings as previously set out in this specification bring before this Court for appellate review the question of whether or not an information charging felonious possession and control of a narcotic drug state a crime for the attempted commission of which appellant can be tried and convicted under Territorial Law.

2. Whether the Court erred in overruling appellant's objections to the admission of testimony on appellee's direct examination of the witness, Power G. Greer, regarding a note, without the note having first been introduced in evidence.

ARGUMENT OF THE CASE.

Specification No. 1.

Appellant could have been, and was found guilty of an attempt to possess and control a narcotic drug which is a criminal offense against the Laws of Alaska.

Section 40-3-2 Alaska Compiled Laws Annotated 1949 reads as follows:

"It shall be unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense, or compound any narcotic drug, except as authorized in this Act."

It is quite obvious that the foregoing denounces certain acts as crimes.

Section 65-2-5, ACLA 1949, which was originally enacted by Congress on March 3, 1899 in 30 Stat. 1253 reads as follows:

“That if any person attempts to commit any crime, and in such attempt does any act toward the commission of such crime, but fails, or is prevented or intercepted in the perpetration thereof, such person when no other provision is made by law for the punishment of such attempt, upon conviction thereof, shall be punished as follows:
* * *”

The appellant denies that 65-2-5 applies insofar as Section 40-3-2 is concerned because she says that Congress did not intend for it to apply.

However, Congress stated in the original act which has now been incorporated in the ACLA 1949 as Section 65-1-3 that:

“Effectiveness of common law: That the Common Law of England as adopted and understood in the United States in regard to criminal matters shall be in force in Alaska except as modified by statutory law of the Territory.”

The general common law concept of attempt is that an attempt to commit *any crime* is an offense whether the offense attempted be a felony or merely a misdemeanor. This concept is set forth in a case quoted by appellant, *State v. Broadnax*, on page 610 of 45 Southern Reporter, 2d series in the opinion.

The general attempts section would not be rendered inapplicable because of the Sec. 40-3-17 ACLA 1949 which deals with certain types of attempts. Section 40-3-17 reads as follows:

“Fraud or Deceit. (1) No person shall obtain or attempt to obtain a narcotic drug, or procure or attempt to procure the administration of a narcotic drug, (a) by fraud, deceit, misrepresentation, or subterfuge; or (b) by the forgery or alteration of a prescription or of any written order; or (c) by the concealment of a material fact; or (d) by the use of a false name or the giving of a false address.

“(2) Information communicated to a physician in an effort unlawfully to procure a narcotic drug, or unlawfully to procure the administration of any such drug, shall not be deemed a privileged communication.

“(3) No person shall wilfully make a false statement in any prescription, order, report, or record, required by this Act.

“(4) No person shall, for the purpose of obtaining a narcotic drug, falsely assume the title of, or represent himself to be, a manufacturer, wholesaler, apothecary, physician, dentist, veterinarian, or other authorized person.

“(5) No person shall make or utter any false or forged prescription or false or forged written order.

“(6) No person shall affix any false or forged label to a package or receptacle containing narcotic drugs.

“(7) The provisions of this section shall apply to all transactions relating to narcotic drugs under the provisions of Section 8 of this Act, in the same way as they apply to transactions under all other sections. (L. 1943, ch. 6, pp. 17, p. 60).”

The foregoing applies when a person obtains or attempts to obtain a narcotic drug under color of authority or by fraud or deceit, all from a lawful source. This case at bar dealt with an attempt to possess narcotics from what was not a legal source, such as a medical doctor or licensed pharmacy. The point is aptly stated in *State v. Broadnax*, in the syllabus at 45 So. (2d) 605 which reads as follows:

“13. Poisons.

“Provision of the uniform narcotic drug act making it an offense to obtain or to attempt to obtain a narcotic drug by fraud, deceit, misrepresentation, or subterfuge describes a crime distinct from offense denounced by provision of the act dealing with unlawful possession of narcotic drugs, and does not preclude application of provision of the criminal code making it a crime to attempt to commit an offense, where only unlawful possession is involved.”

Counsel for appellant stated on page 18 of his brief:

“When confronted with the argument that the specific attempts enumerated in Section 17 of the Narcotics Act indicated legislative intent not to make the ‘attempts’ article applicable, the court could only state, at page 410 of the opinion as printed in the Southern Reporter:

‘We do not agree that Section 17 shows any intention of the redactors of the Code to exclude Section 2 of the Uniform Narcotic Drugs Act from the application of Article 27.’ ”

However, the Court stated much more than that portion quoted by counsel for appellant and that portion of the opinion set forth on page 610 of 45 So. (2d) is quoted herewith in its entirety:

“(13) Counsel for defendant argue and contend that Article 27 is not applicable in the instant case, for the reason that Section 17 of the Uniform Narcotic Drug Act, the Act under which defendant was prosecuted, makes it an offense to obtain or attempt to obtain a narcotic drug under certain circumstances, and that for this reason it was not the intention of the authors of the Criminal Code that the attempt article of that Code should be applicable to the offense here charged. Section 17 does make it an offense to obtain or attempt to obtain a narcotic drug by fraud, deceit, misrepresentation, or subterfuge or by forgery, alteration of prescription or any written order, or by the concealing of any material fact, or by the use of a false name or the giving of a false address, etc. It was clearly the intention of the Legislature to denounce the acts set forth in Section 17 as crimes separate and distinct from, and not connected with, the offense denounced in Section 2 of the Act dealing with unlawful possession of such drugs. What Section 17 denounces is the obtaining or attempting to obtain a narcotic drug under color of authority or by fraud or deceit. We

do not agree that Section 17 shows any intention of the redactors of the Code to exclude Section 2 of the Uniform Narcotic Drug Act from the application of Article 27."

Minter v. State (1942), 75 Okl. Cr. 133, 129 P. (2d) 210, cited by appellant, is not applicable in the case at bar because this offense could not have been charged under Section 17 of the Uniform Narcotic Drug Act, which section, as previously stated, is a limited "attempts" section.

People v. Marks (1914), 24 Cal. App. 610, 142 P. 98, also cited by appellant is inapplicable to the present case for the reasons set forth under *Minter v. State*, *supra*.

In no instance is *Rich v. State* (1937), 61 Okla. Crim. Rep. 148, 66 P. (2d) 950, cited by appellant in point. The question presented in the "Rich" case was whether or not a former narcotic act was repealed by enactment of the Uniform Narcotic Drug Act. The determination of such a question has no bearing in this present case wherein we are to determine the effect of a "general attempts" statute on the Uniform Narcotic Drug Act.

In conclusion, regarding Specification No. 1, it is quite evident that the Louisiana case, *State v. Broadnax*, 45 So. (2d) 604 is "on all fours" with the present case and shows that a "general attempts" statute applies to violations of the Uniform Narcotic Drug Act.

It is submitted on the basis of the foregoing authorities and argument, that the action of the trial Court in this cause, should be affirmed.

ARGUMENT ON SPECIFICATION NO. 2.

Appellant cites as error the refusal of the trial Court to sustain the defendant's objection to testimony concerning a note without the note being first introduced in evidence.

Appellee respectfully submits that the note itself became immaterial upon the introduction into evidence of the admissions of defendant regarding the contents of the note. The best evidence rule does not apply when parol admissions against interest are introduced and such admissions are competent as primary evidence against the party making them although they involve what must necessarily be contained in a written instrument. This concept of law is well stated by the Court on page 310 of the opinion in *Gardner v. City of Columbia Police Dept., et al.*, 57 S.E. (2d) wherein the Court said:

“(10) ‘The admissions of a party are not open to the same objection which belongs to parol evidence from other sources. A party's own statements and admissions are, in all cases, admissible in evidence against him, though such statements and admissions may involve what must necessarily be contained in some writing, deed or record.’ Jones on Evidence, Sec. 208, Page 256. And it is

generally held that the best evidence rule does not apply to parol admissions in pais and against interest, or acts equivalent thereto, and that such admissions are competent as primary evidence against the party making them, although they involve what must necessarily be contained in a written instrument. I Greenleaf on Evidence, Secs. 96, 97; 32 CJS Evidence SS. 788, page 714; 20 Am. Jur., Sec. 425, Page 379; Llewellyn v. Atlantic Greyhound Corp., 204 S.C. 156, 28 SE (2d) 673."

Mr. Power G. Greer testified that he showed the note to defendant, Leona Simpson, and asked her if she had written it and she stated that she had written it. Mr. Greer asked again if she gave the note to the cab driver and if this was the package she had sent him to pick up. She replied affirmatively but stated that she was just going to keep the package for someone. She refused to tell for whom she intended to keep the package (T.R. 33, 34, 35, 61, 71, 72). Thus it may be seen that the defendant did make certain admissions against interest that could stand as primary evidence and render unnecessary the introduction of the note in evidence.

Appellee further contends that a sufficient showing was made that the note had been lost on appellant's premises to permit the introduction of secondary evidence if we disregard entirely the admissions against interest discussed in the preceding paragraph.

After Mr. Greer testified that he had shown the note to Leona Simpson and she acknowledged writing it, giving it to the cab driver and sending him for the package, Greer further stated that he lost the note while at Leona Simpson's house. The fact that the note was lost, on defendant's premises, was also testified to by U. S. Marshal T. R. McRoberts (T.R. 37, 38, 39, 49, 62, 66). No evidence was introduced by defendant. It was, therefore, shown that the document was lost to the government and is presumably in the possession and custody of defendant since it was lost in her home. The following is quoted from 67 A.L.R. 79:

“The rule was well stated in *McKnight v. United States* (1902), 54 C.C.A. 358, 115 Fed. 972, where the court said: ‘The authorities seem very clear that in such cases, where a criminating document directly bearing upon the issue to be proven is in the possession of the accused, the prosecution may be permitted to show the contents thereof, without notice to the defendant to produce it. As it would be beyond the power of the court to require the accused to criminate himself by the production of the paper as evidence against himself, secondary evidence is admissible to show its contents. As the introduction of secondary evidence of a writing in such instances is founded upon proof showing the original to be in the possession of the defendant, it will ordinarily be in his power to produce it, if he regards it for his interest to do so.’”

It is submitted on the basis of the foregoing authorities and argument, that the action of the trial Court in this cause, should be affirmed.

Dated, January 4, 1952.

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Service by receipt of copy of the foregoing brief of appellee is hereby acknowledged, this 4th day of January, 1952.

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No. 13023

United States
Court of Appeals
For the Ninth Circuit.

AL FREED,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Southern District of California,
Central Division.

No. 13023

United States
Court of Appeals
For the Ninth Circuit.

AL FREED,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Southern District of California,
Central Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the United States District Court in and for
the Southern District of California, Central
Division

No. 21377 CD

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RALPH KUSHNER, BEN GREENBLATT, AL-
BERT FREED, FRED JOHNSEN, BER-
NARD SCHOENFELD, FRANK METH,
SAM JOSIPOVIE, M. KUSHNER, ELMER
ALTERMAN, SID ULANSKY, RUBIN
PREMAZON, HERMAN M. PEARL,
JOSEPH ROSENBERG, PHILIP M.
BOROCK, and BEN WARREN, aka BEN
J. WARREN,

Defendants.

INDICTMENT

U. S. C. Title 18, Sec. 88 (1946 Ed.) U. S. C. Title
12, Sec. 1731 (a) 9 F. R. 7253 Et Seq., 12 F. R.
4369 Et Seq.—Conspiracy to Commit Offenses
Against the United States; Conspiracy to De-
fraud the United States; Conspiracy to Make,
Pass, Utter, and Publish False Statements Re.
F. H. A. Title I Loan Applications.

The grand jury charges:

* * *

Count Two

(Sec. 1731 (a), Title 12 U.S.C.)

On or about February 6, 1947, in Los Angeles County, California, within the Central Division of the Southern District of California, the defendants Ben Greenblatt, Alfred Freed, Ralph Kushner, Fred Johnsen, and Bernard Schoenfeld, for the purpose of obtaining a loan and an advance of credit from a corporation, namely, the Bank of America National Trust and Savings Association, with the intent that such loan and advance of credit should be offered to and accepted by the Federal Housing Administration for insurance, under the provisions of Title I of the National Housing Act, Title 12 of the United States Code Supplement, Section 1703 as amended, and regulations of the Federal Housing Commissioner governing property improvement loans issued thereunder, (9 F. R. 7253, et seq. as amended), did make, pass, utter and publish, and did cause to be made, passed, uttered and published, a statement, knowing the same to be false in that the defendants did prepare and present and did cause to be prepared and did cause to be presented, to the Bank of America National Trust and Savings Association, a written Federal Housing Administration Title I Credit application for a property improvement loan containing the signatures of Fred O. Jonson and Lenore Jonson, as borrowers, said application applying for and requesting credit in the amount of \$2,498.00, and said application stating and representing that said credit

was to be used for the purchase of materials for additions and improvements to a dwelling house located at 1904 Plant St., Redondo Beach, California, the defendants then knowing that the said statement was false in that the defendants then knew that the loan and credit so applied for was not to be used for the purchase of materials for additions and improvements to a dwelling house, at the aforesaid address, nor for additions and improvements to any dwelling house, but was to be used for the purchase of materials for the construction of a new dwelling house.

* * *

Count Four

(Title 12, U.S.C., Sec. 1731 (a))

On or about January 27, 1947, in Los Angeles County, California, within the Central Division of the Southern District of California, the defendants Ben Greenblatt, Albert Freed, Ralph Kushner, Fred Johnsen and Bernard Schoenfeld, for the purpose of obtaining a loan and an advance of credit from a corporation, namely, the Bank of America National Trust and Savings Association, with the intent that such loan and advance of credit should be offered to and accepted by the Federal Housing Administration for insurance, under the provisions of Title I of the National Housing Act, Title 12 of the United States Code Supplement, Section 1703 as amended, and regulations of the Federal Housing Commissioner governing property improvement loans issued thereunder, (9 F. R. 7253

et seq., as amended), did make, pass, utter, and publish, and did cause to be made, passed, uttered, and published, a statement knowing the same to be false in that the defendants did prepare and present and did cause to be prepared and did cause to be presented to the Bank of America National Trust and Savings Association, a written Federal Housing Administration Title I Credit Application for a property improvement loan containing the signatures of James Rodriguez and Emma R. Rodriguez, as borrowers, said application stating and representing that said credit was to be used for the purchase of materials for additions and improvements to a dwelling house located at 4423 W. 154th Street, Lawndale, California, the defendants then knowing that the said statement was false in that the defendants then knew that the loan and credit so applied for was not to be used for the purchase of materials for additions and improvements to a dwelling house at the aforesaid address nor for additions and improvements to any dwelling house, but was to be used for the purchase of materials for the construction of a new dwelling house.

* * *

A True Bill,

/s/ D. C. BAILEY,
Foreman.

/s/ ERNEST A. TOLIN,
United States Attorney.

[Endorsed]: Filed June 28, 1950.

[Title of District Court and Cause.]

NOTICE OF MOTION

To the Above-Named Plaintiff and to Ernest A.
Tolin, Esq., United States Attorney:

Please Take Notice that on Monday, the 14th day of August, 1950, at the hour of 10:00 a.m., or as soon thereafter as cause may be heard, the above-named defendants, Ben Greenblatt, Al Freed (therein designated Albert Freed) and Bernard Schoenfeld, will move the above-entitled court, in the court room of the Honorable Judge Ben Harrison, to dismiss and quash Counts Two, Three, Four, Six, Seven, Nine, Ten, Eleven, Twelve, Thirteen, Fourteen, Sixteen, Twenty, Twenty-one, Twenty-two, Twenty-five, Twenty-six, Twenty-seven, Thirty-one, Thirty-five, Thirty-six, Thirty-nine and Forty of the Indictment herein.

That the grounds of such motion are set forth in a written motion hereto annexed and by reference thereto, made a part hereof.

Dated this 7th day of July, 1950.

EUGENE L. WOLVER,

By /s/ GEORGE GOLDMAN,

Attorney for Above-Named
Defendants.

[Title of District Court and Cause.]

MOTION TO DISMISS AND QUASH

Come now the above-named defendants, Ben Greenblatt, Al Freed (therein designated Albert Freed) and Bernard Schoenfeld and move the above-entitled court to dismiss and quash the following counts of the Indictment herein, to wit: Counts Two, Three, Four, Six, Seven, Nine, Ten, Eleven, Twelve, Thirteen, Fourteen, Sixteen, Twenty, Twenty-one, Twenty-two Twenty-five, Twenty-six, Twenty-seven, Thirty-one, Thirty-five, Thirty-six, Thirty-nine and Forty, upon the ground that each and all of said counts are barred by the Statute of Limitations and particularly Title 18, United States Code—Crimes and Criminal Procedure, Section 3282.

That this motion will be based upon said Indictment, said code section and upon the Notice of Motion and the within motion.

Dated this 7th day of July, 1950.

EUGENE L. WOLVER,

By /s/ GEORGE GOLDMAN,

Attorney for Above-Named
Defendants.

[Endorsed]: Filed July 7, 1950.

[Title of District Court and Cause.]

MOTION FOR BILL OF PARTICULARS

The defendant, Al Freed, above-named, by Eugene L. Wolver, his attorney, moves the court for an order requiring the United States of America, the plaintiff herein, to furnish said defendant, within a time to be therein specified, a written Bill of Particulars, as to the following matters alleged in the Indictment herein, as follows:

1. How or in what manner said defendant participated, aided or abetted in the alleged commission of Overt Act Number 1 alleged on page 4, lines 1 to 4 of the Indictment hereof.

2. How or in what manner said defendant participated, aided or abetted in the alleged commission of Overt Act Number 2 alleged on page 4, lines 2 to 5 of the Indictment hereof.

3. How or in what manner said defendant participated, aided or abetted in the alleged commission of Overt Act Number 3 alleged on page 4, lines 8 to 10 of the Indictment hereof.

4. The name of the purchasers and the description and addresses of the buildings allegedly examined by said defendant in North Redondo Beach, California, as alleged in Overt Act Number 4, page 4, lines 11 to 14 of the Indictment hereof.

5. The time, place and parties present and the subject matter in substance of the conversation allegedly had between Sol Glass and said defendant,

as alleged in Overt Act Number 5, page 4, lines 15 to 16 of the Indictment hereof.

6. How or in what manner said defendant, participated, aided or abetted in the alleged commission of Overt Act Number 6 alleged on page 4, lines 17 to 20 of the Indictment hereof.

7. How or in what manner said defendant participated, aided or abetted in the alleged commission of Overt Act Number 7 alleged on page 4, lines 21 to 22 of the Indictment hereof.

8. How or in what manner said defendant participated, aided or abetted in the alleged commission of Overt Act Number 8 alleged on page 4, lines 23 to 27 of the Indictment hereof.

9. How or in what manner said defendant participated, aided or abetted in the alleged commission of Overt Act Number 9 alleged on page 4, lines 28 to 29 and page 5, lines 1 to 2 of the Indictment hereof.

10. How or in what manner said defendant participated, aided or abetted in the alleged commission of Overt Act Number 10 alleged on page 5, lines 3 to 5 of the Indictment hereof.

11. How or in what manner said defendant participated, aided or abetted in the alleged commission of Overt Act Number 11 alleged on page 5, lines 6 to 9 of the Indictment hereof.

12. How or in what manner said defendant participated, aided or abetted in the alleged commis-

sion of Overt Act Number 12 alleged on page 5, lines 10 to 13 of the Indictment hereof.

13. How or in what manner said defendant participated, aided or abetted in the alleged commission of Overt Act Number 13 alleged on page 5, lines 14 to 17 of the Indictment hereof.

14. How or in what manner said defendant participated, aided or abetted in the alleged commission of Overt Act Number 14 alleged on page 5, lines 18 to 21 of the Indictment hereof.

15. How or in what manner said defendant participated, aided or abetted in the alleged commission of Overt Act Number 15 alleged on page 5, lines 22 to 25 of the Indictment hereof.

16. How or in what manner said defendant participated, aided or abetted in the alleged commission of Overt Act Number 16 alleged on page 5, lines 26 to 27 of the Indictment hereof.

17. How or in what manner said defendant participated, aided or abetted in the alleged commission of Overt Act Number 17 alleged on page 5, lines 28 to 31 of the Indictment hereof.

18. How or in what manner said defendant participated, aided or abetted in the alleged commission of Overt Act Number 18 alleged on page 5, line 32 and page 6, lines 1 to 2 of the Indictment hereof.

19. How or in what manner said defendant participated, aided or abetted in the alleged commis-

sion of Overt Act Number 19 alleged on page 6, lines 3 to 5 of the Indictment hereof.

20. How or in what manner said defendant participated, aided or abetted in the alleged commission of Overt Act Number 20 alleged on page 6, lines 6 to 8 of the Indictment hereof.

21. How or in what manner said defendant participated, aided or abetted in the alleged commission of Overt Act Number 21 alleged on page 6, lines 9 to 10 of the Indictment hereof.

22. How or in what manner said defendant participated, aided or abetted in the alleged commission of Overt Act Number 22, alleged on page 6, lines 11 to 12 of the Indictment hereof.

23. In what manner the said defendant participated, aided or abetted in the commission of the offense set forth in Count 2 of the Indictment and the exact wording in said application therein described, alleged to be the statement known to be false; the date when said statement was prepared and signed and the exact date when the same was presented to the Bank of America National Trust and Savings Association.

24. In what manner the said defendant participated, aided or abetted in the commission of the offense set forth in Count 3 of the Indictment and the exact wording in said application therein described, alleged to be the statement known to be false; the date when said statement was prepared and signed and the exact date when the same was

presented to the Bank of America National Trust and Savings Association.

25. In what manner the said defendant participated, aided or abetted in the commission of the offense set forth in Count 4 of the Indictment and the exact wording in said application therein described, alleged to be the statement known to be false; the date when said statement was prepared and signed and the exact date when the same was presented to the Bank of America National Trust and Savings Association.

26. In what manner the said defendant participated, aided or abetted in the commission of the offense set forth in Count 5 of the Indictment and the exact wording in said application therein described, alleged to be the statement known to be false; the date when said statement was prepared and signed and the exact date when the same was presented to the Bank of America National Trust and Savings Association.

27. In what manner the said defendant participated, aided or abetted in the commission of the offense set forth in Count 6 of the Indictment and the exact wording in said application therein described, alleged to be the statement known to be false; the date when said statement was prepared and signed and the exact date when the same was presented to the Bank of America National Trust and Savings Association.

28. In what manner the said defendant partici-

pated, aided or abetted in the commission of the offense set forth in Count 7 of the Indictment and the exact wording in said application therein described, alleged to be the statement known to be false; the date when said statement was prepared and signed and the exact date when the same was presented to the Bank of America National Trust and Savings Association.

29. In what manner the said defendant participated, aided or abetted in the commission of the offense set forth in Count 8 of the Indictment and the exact wording in said application therein described, alleged to be the statement known to be false; the date when said statement was prepared and signed and the exact date when the same was presented to the Bank of America National Trust and Savings Association.

30. In what manner the said defendant participated, aided or abetted in the commission of the offense set forth in Count 8 of the Indictment and the exact wording in said application therein described, alleged to be the statement known to be false; the date when said statement was prepared and signed and the exact date when the same was presented to the Bank of America National Trust and Savings Association.

31. In what manner the said defendant participated, aided or abetted in the commission of the offense set forth in Count 9 of the Indictment and the exact wording in said application therein described, alleged to be the statement known to be

false; the date when said statement was prepared and signed and the exact date when the same was presented to the Bank of America National Trust and Savings Association.

32. In what manner the said defendant participated, aided or abetted in the commission of the offense set forth in Count 10 of the Indictment and the exact wording in said application therein described, alleged to be the statement known to be false; the date when said statement was prepared and signed and the exact date when the same was presented to the Bank of America National Trust and Savings Association.

33. In what manner the said defendant participated, aided or abetted in the commission of the offense set forth in Count 11 of the Indictment and the exact wording in said application therein described, alleged to be the statement known to be false; the date when said statement was prepared and signed and the exact date when the same was presented to the Bank of America National Trust and Savings Association.

34. In what manner the said defendant participated, aided or abetted in the commission of the offense set forth in Count 12 of the Indictment and the exact wording in said application therein described, alleged to be the statement known to be false; the date when said statement was prepared and signed and the exact date when the same was presented to the Bank of America National Trust and Savings Association.

35. In what manner the said defendant participated, aided or abetted in the commission of the offense set forth in Count 13 of the Indictment and the exact wording in said application therein described, alleged to be the statement known to be false; the date when said statement was prepared and signed and the exact date when the same was presented to the Bank of America National Trust and Savings Association.

36. In what manner the said defendant participated, aided or abetted in the commission of the offense set forth in Count 14 of the Indictment and the exact wording in said application therein described, alleged to be the statement known to be false; the date when said statement was prepared and signed and the exact date when the same was presented to the Bank of America National Trust and Savings Association.

37. In what manner the said defendant participated, aided or abetted in the commission of the offense set forth in Count 15 of the Indictment and the exact wording in said application therein described, alleged to be the statement known to be false; the date when said statement was prepared and signed and the exact date when the same was presented to the Bank of America National Trust and Savings Association.

38. In what manner the said defendant participated, aided or abetted in the commission of the offense set forth in Count 16 of the Indictment and the exact wording in said application therein de-

scribed, alleged to be the statement known to be false; the date when said statement was prepared and signed and the exact date when the same was presented to the Bank of America National Trust and Savings Association.

39. In what manner the said defendant participated, aided or abetted in the commission of the offense set forth in Count 17 of the Indictment and the exact wording in said application therein described, alleged to be the statement known to be false; the date when said statement was prepared and signed and the exact date when the same was presented to the Bank of America National Trust and Savings Association.

40. In what manner the said defendant participated, aided or abetted in the commission of the offense set forth in Count 18 of the Indictment and the exact wording in said application therein described, alleged to be the statement known to be false; the date when said statement was prepared and signed and the exact date when the same was presented to the Bank of America National Trust and Savings Association.

41. In what manner the said defendant participated, aided or abetted in the commission of the offense set forth in Count 19 of the Indictment and the exact wording in said application therein described, alleged to be the statement known to be false; the date when said statement was prepared and signed and the exact date when the same was

presented to the Bank of America National Trust and Savings Association.

42. In what manner the said defendant participated, aided or abetted in the commission of the offense set forth in Count 20 of the Indictment and the exact wording in said application therein described, alleged to be the statement known to be false; the date when said statement was prepared and signed and the exact date when the same was presented to the Bank of America National Trust and Savings Association.

43. In what manner the said defendant participated, aided or abetted in the commission of the offense set forth in Count 21 of the Indictment and the exact wording in said application therein described, alleged to be the statement known to be false; the date when said statement was prepared and signed and the exact date when the same was presented to the Bank of America National Trust and Savings Association.

44. In what manner the said defendant participated, aided or abetted in the commission of the offense set forth in Count 22 of the Indictment and the exact wording in said application therein described, alleged to be the statement known to be false; the date when said statement was prepared and signed and the exact date when the same was presented to the Bank of America National Trust and Savings Association.

45. In what manner the said defendant partici-

pated, aided or abetted in the commission of the offense set forth in Count 23 of the Indictment and the exact wording in said application therein described, alleged to be the statement known to be false; the date when said statement was prepared and signed and the exact date when the same was presented to the Bank of America National Trust and Savings Association.

46. In what manner the said defendant participated, aided or abetted in the commission of the offense set forth in Count 24 of the Indictment and the exact wording in said application therein described, alleged to be the statement known to be false; the date when said statement was prepared and signed and the exact date when the same was presented to the Bank of America National Trust and Savings Association.

47. In what manner the said defendant participated, aided or abetted in the commission of the offense set forth in Count 25 of the Indictment and the exact wording in said application therein described, alleged to be the statement known to be false; the date when said statement was prepared and signed and the exact date when the same was presented to the Bank of America National Trust and Savings Association.

48. In what manner the said defendant participated, aided or abetted in the commission of the offense set forth in Count 26 of the Indictment and the exact wording in said application therein described, alleged to be the statement known to be

false; the date when said statement was prepared and signed and the exact date when the same was presented to the Bank of America National Trust and Savings Association.

49. In what manner the said defendant participated, aided or abetted in the commission of the offense set forth in Count 27 of the Indictment and the exact wording in said application therein described, alleged to be the statement known to be false; the date when said statement was prepared and signed and the exact date when the same was presented to the Bank of America National Trust and Savings Association.

50. In what manner the said defendant participated, aided or abetted in the commission of the offense set forth in Count 28 of the Indictment and the exact wording in said application therein described, alleged to be the statement known to be false; the date when said statement was prepared and signed and the exact date when the same was presented to the Bank of America National Trust and Savings Association.

51. In what manner the said defendant participated, aided or abetted in the commission of the offense set forth in Count 29 of the Indictment and the exact wording in said application therein described, alleged to be the statement known to be false; the date when said statement was prepared and signed and the exact date when the same was presented to the Bank of America National Trust and Savings Association.

52. In what manner the said defendant participated, aided or abetted in the commission of the offense set forth in Count 30 of the Indictment and the exact wording in said application therein described, alleged to be the statement known to be false; the date when said statement was prepared and signed and the exact date when the same was presented to the Bank of America National Trust and Savings Association.

53. In what manner the said defendant participated, aided or abetted in the commission of the offense set forth in Count 31 of the Indictment and the exact wording in said application therein described, alleged to be the statement known to be false; the date when said statement was prepared and signed and the exact date when the same was presented to the Bank of America National Trust and Savings Association.

54. In what manner the said defendant participated, aided or abetted in the commission of the offense set forth in Count 32 of the Indictment and the exact wording in said application therein described, alleged to be the statement known to be false; the date when said statement was prepared and signed and the exact date when the same was presented to the Bank of America National Trust and Savings Association.

55. In what manner the said defendant participated, aided or abetted in the commission of the offense set forth in Count 33 of the Indictment and the exact wording in said application therein de-

scribed, alleged to be the statement known to be false; the date when said statement was prepared and signed and the exact date when the same was presented to the Bank of America National Trust and Savings Association.

56. In what manner the said defendant participated, aided or abetted in the commission of the offense set forth in Count 34 of the Indictment and the exact wording in said application therein described, alleged to be the statement known to be false; the date when said statement was prepared and signed and the exact date when the same was presented to the Bank of America National Trust and Savings Association.

57. In what manner the said defendant participated, aided or abetted in the commission of the offense set forth in Count 35 of the Indictment and the exact wording in said application therein described, alleged to be the statement known to be false; the date when said statement was prepared and signed and the exact date when the same was presented to the Bank of America National Trust and Savings Association.

58. In what manner the said defendant participated, aided or abetted in the commission of the offense set forth in Count 36 of the Indictment and the exact wording in said application therein described, alleged to be the statement known to be false; the date when said statement was prepared and signed and the exact date when the same was

presented to the Bank of America National Trust and Savings Association.

59. In what manner the said defendant participated, aided or abetted in the commission of the offense set forth in Count 37 of the Indictment and the exact wording in said application therein described, alleged to be the statement known to be false; the date when said statement was prepared and signed and the exact date when the same was presented to the Bank of America National Trust and Savings Association.

60. In what manner the said defendant participated, aided or abetted in the commission of the offense set forth in Count 38 of the Indictment and the exact wording in said application therein described, alleged to be the statement known to be false; the date when said statement was prepared and signed and the exact date when the same was presented to the Bank of America National Trust and Savings Association.

61. In what manner the said defendant participated, aided or abetted in the commission of the offense set forth in Count 39 of the Indictment and the exact wording in said application therein described, alleged to be the statement known to be false; the date when said statement was prepared and signed and the exact date when the same was presented to the Bank of America National Trust and Savings Association.

62. In what manner the said defendant participated, aided or abetted in the commission of the

offense set forth in Count 40 of the Indictment and the exact wording in said application therein described, alleged to be the statement known to be false; the date when said statement was prepared and signed and the exact date when the same was presented to the Bank of America National Trust and Savings Association.

63. In what manner the said defendant participated, aided or abetted in the commission of the offense set forth in Count 41 of the Indictment and the exact wording in said application therein described, alleged to be the statement known to be false; the date when said statement was prepared and signed and the exact date when the same was presented to the Bank of America National Trust and Savings Association.

64. Is it claimed by the Government that said defendant, personally, either prepared or caused said application, described in Count 2 of the Indictment, to be signed or presented to the Bank of America National Trust and Savings Association?

65. Is it claimed by the Government that said defendant personally, either prepared or caused said application, described in Count 3 of the Indictment, to be signed or presented to the Bank of America National Trust and Savings Association?

66. Is it claimed by the Government that said defendant personally, either prepared or caused

said application, described in Count 4 of the Indictment, to be signed or presented to the Bank of America National Trust and Savings Association?

67. Is it claimed by the Government that said defendant personally, either prepared or caused said application, described in Count 5 of the Indictment, to be signed or presented to the Bank of America National Trust and Savings Association?

67a. Is it claimed by the Government that said defendant personally, either prepared or caused said application, described in Count 6 of the Indictment, to be signed or presented to the Bank of America National Trust and Savings Association?

68. Is it claimed by the Government that said defendant personally, either prepared or caused said application, described in Count 7 of the Indictment, to be signed or presented to the Bank of America National Trust and Savings Association?

69. Is it claimed by the Government that said defendant personally, either prepared or caused said application, described in Count 8 of the Indictment, to be signed or presented to the Bank of America National Trust and Savings Association?

70. Is it claimed by the Government that said defendant personally, either prepared or caused said application, described in Count 9 of the Indictment, to be signed or presented to the Bank of America National Trust and Savings Association?

71. Is it claimed by the Government that said defendant personally, either prepared or caused said application, described in Count 10 of the Indictment, to be signed or presented to the Bank of America National Trust and Savings Association?

72. Is it claimed by the Government that said defendant personally, either prepared or caused said application, described in Count 11 of the Indictment, to be signed or presented to the Bank of America National Trust and Savings Association?

73. Is it claimed by the Government that said defendant personally, either prepared or caused said application, described in Count 12 of the Indictment, to be signed or presented to the Bank of America National Trust and Savings Association?

74. Is it claimed by the Government that said defendant personally, either prepared or caused said application, described in Count 13 of the Indictment, to be signed or presented to the Bank of America National Trust and Savings Association?

75. Is it claimed by the Government that said defendant personally, either prepared or caused said application, described in Count 14 of the Indictment, to be signed or presented to the Bank of America National Trust and Savings Association?

76. Is it claimed by the Government that said defendant personally, either prepared or caused said application, described in Count 15 of the Indictment, to be signed or presented to the Bank of America National Trust and Savings Association?

77. Is it claimed by the Government that said defendant personally, either prepared or caused said application, described in Count 16 of the Indictment, to be signed or presented to the Bank of America National Trust and Savings Association?

78. Is it claimed by the Government that said defendant personally, either prepared or caused said application, described in Count 17 of the Indictment, to be signed or presented to the Bank of America National Trust and Savings Association?

79. Is it claimed by the Government that said defendant personally, either prepared or caused said application, described in Count 18 of the Indictment, to be signed or presented to the Bank of America National Trust and Savings Association?

80. Is it claimed by the Government that said defendant personally, either prepared or caused said application, described in Count 19 of the Indictment, to be signed or presented to the Bank of America National Trust and Savings Association?

81. Is it claimed by the Government that said defendant personally, either prepared or caused said application, described in Count 20 of the Indictment, to be signed or presented to the Bank of America National Trust and Savings Association?

82. Is it claimed by the Government that said defendant personally, either prepared or caused said application, described in Count 21 of the Indictment, to be signed or presented to the Bank of America National Trust and Savings Association?

83. Is it claimed by the Government that said defendant personally, either prepared or caused said application, described in Count 22 of the Indictment, to be signed or presented to the Bank of America National Trust and Savings Association?

84. Is it claimed by the Government that said defendant personally, either prepared or caused said application, described in Count 23 of the Indictment, to be signed or presented to the Bank of America National Trust and Savings Association?

85. Is it claimed by the Government that said defendant personally, either prepared or caused said application, described in Count 24 of the Indictment, to be signed or presented to the Bank of America National Trust and Savings Association?

86. Is it claimed by the Government that said defendant personally, either prepared or caused said application, described in Count 25 of the Indictment, to be signed or presented to the Bank of America National Trust and Savings Association?

87. Is it claimed by the Government that said defendant personally, either prepared or caused said application, described in Count 26 of the Indictment, to be signed or presented to the Bank of America National Trust and Savings Association?

88. Is it claimed by the Government that said defendant personally, either prepared or caused said application, described in Count 27 of the Indictment, to be signed or presented to the Bank of America National Trust and Savings Association?

89. Is it claimed by the Government that said defendant personally, either prepared or caused said application, described in Count 28 of the Indictment, to be signed or presented to the Bank of America National Trust and Savings Association?

90. Is it claimed by the Government that said defendant personally, either prepared or caused said application, described in Count 29 of the Indictment, to be signed or presented to the Bank of America National Trust and Savings Association?

91. Is it claimed by the Government that said defendant personally, either prepared or caused said application, described in Count 30 of the Indictment, to be signed or presented to the Bank of America National Trust and Savings Association?

92. Is it claimed by the Government that said defendant personally, either prepared or caused said application, described in Count 31 of the Indictment, to be signed or presented to the Bank of America National Trust and Savings Association?

93. Is it claimed by the Government that said defendant personally, either prepared or caused said application, described in Count 32 of the Indictment, to be signed or presented to the Bank of America National Trust and Savings Association?

94. Is it claimed by the Government that said defendant personally, either prepared or caused said application, described in Count 33 of the Indictment, to be signed or presented to the Bank of America National Trust and Savings Association?

95. Is it claimed by the Government that said defendant personally, either prepared or caused said application, described in Count 34 of the Indictment, to be signed or presented to the Bank of America National Trust and Savings Association?

96. Is it claimed by the Government that said defendant personally, either prepared or caused said application, described in Count 35 of the Indictment, to be signed or presented to the Bank of America National Trust and Savings Association?

97. Is it claimed by the Government that said defendant personally, either prepared or caused said application, described in Count 36 of the Indictment, to be signed or presented to the Bank of America National Trust and Savings Association?

98. Is it claimed by the Government that said defendant personally, either prepared or caused said application, described in Count 37 of the Indictment, to be signed or presented to the Bank of America National Trust and Savings Association?

99. Is it claimed by the Government that said defendant personally, either prepared or caused said application, described in Count 38 of the Indictment, to be signed or presented to the Bank of America National Trust and Savings Association?

100. Is it claimed by the Government that said defendant personally, either prepared or caused said application, described in Count 39 of the Indictment, to be signed or presented to the Bank of America National Trust and Savings Association?

101. Is it claimed by the Government that said defendant personally, either prepared or caused said application, described in Count 40 of the Indictment, to be signed or presented to the Bank of America National Trust and Savings Association?

102. Is it claimed by the Government that said defendant personally, either prepared or caused said application, described in Count 41 of the Indictment, to be signed or presented to the Bank of America National Trust and Savings Association?

103. Is the prosecution of Count 2 of the Indictment, based upon 12 U. S. Code Supplement, Section 1703 as amended, or the regulations of the Federal Housing Commissioner and if the latter, what section or sections were allegedly violated?

104. Is the prosecution of Count 3 of the Indictment, based upon 12 U. S. Code Supplement, Section 1703 as amended, or the regulations of the Federal Housing Commissioner and if the latter, what section or sections were allegedly violated?

105. Is the prosecution of Count 4 of the Indictment, based upon 12 U. S. Code Supplement, Section 1703 as amended, or the regulations of the Federal Housing Commissioner and if the latter, what section or sections were allegedly violated?

106. Is the prosecution of Count 5 of the Indictment, based upon 12 U. S. Code Supplement, Section 1703 as amended, or the regulations of the Federal Housing Commissioner and if the latter, what section or sections were allegedly violated?

107. Is the prosecution of Count 6 of the Indictment, based upon 12 U. S. Code Supplement, Section 1703 as amended, or the regulations of the Federal Housing Commissioner and if the latter, what section or sections were allegedly violated?

108. Is the prosecution of Count 7 of the Indictment, based upon 12 U. S. Code Supplement, Section 1703 as amended, or the regulations of the Federal Housing Commissioner and if the latter, what section or sections were allegedly violated?

109. Is the prosecution of Count 8 of the Indictment, based upon 12 U. S. Code Supplement, Section 1703 as amended, or the regulations of the Federal Housing Commissioner and if the latter, what section or sections were allegedly violated?

110. Is the prosecution of Count 9 of the Indictment, based upon 12 U. S. Code Supplement, Section 1703 as amended, or the regulations of the Federal Housing Commissioner and if the latter, what section or sections were allegedly violated?

111. Is the prosecution of Count 10 of the Indictment, based upon 12 U. S. Code Supplement, Section 1703 as amended, or the regulations of the Federal Housing Commissioner and if the latter, what section or sections were allegedly violated?

112. Is the prosecution of Count 11 of the Indictment, based upon 12 U. S. Code Supplement, Section 1703 as amended, or the regulations of the Federal Housing Commissioner and if the latter, what section or sections were allegedly violated?

113. Is the prosecution of Count 12 of the Indictment, based upon 12 U. S. Code Supplement, Section 1703 as amended, or the regulations of the Federal Housing Commissioner and if the latter, what section or sections were allegedly violated?

114. Is the prosecution of Count 13 of the Indictment, based upon 12 U. S. Code Supplement, Section 1703 as amended, or the regulations of the Federal Housing Commissioner and if the latter, what section or sections were allegedly violated?

115. Is the prosecution of Count 14 of the Indictment, based upon 12 U. S. Code Supplement, Section 1703 as amended, or the regulations of the Federal Housing Commissioner and if the latter, what section or sections were allegedly violated?

116. Is the prosecution of Count 15 of the Indictment, based upon 12 U. S. Code Supplement, Section 1703 as amended, or the regulations of the Federal Housing Commissioner and if the latter, what section or sections were allegedly violated?

117. Is the prosecution of Count 16 of the Indictment, based upon 12 U. S. Code Supplement, Section 1703 as amended, or the regulations of the Federal Housing Commissioner and if the latter, what section or sections were allegedly violated?

118. Is the prosecution of Count 17 of the Indictment, based upon 12 U. S. Code Supplement, Section 1703 as amended, or the regulations of the Federal Housing Commissioner and if the latter, what section or sections were allegedly violated?

119. Is the prosecution of Count 18 of the Indictment, based upon 12 U. S. Code Supplement, Section 1703 as amended, or the regulations of the Federal Housing Commissioner and if the latter, what section or sections were allegedly violated?

120. Is the prosecution of Count 19 of the Indictment, based upon 12 U. S. Code Supplement, Section 1703 as amended, or the regulations of the Federal Housing Commissioner and if the latter, what section or sections were allegedly violated?

121. Is the prosecution of Count 20 of the Indictment, based upon 12 U. S. Code Supplement, Section 1703 as amended, or the regulations of the Federal Housing Commissioner and if the latter, what section or sections were allegedly violated?

122. Is the prosecution of Count 21 of the Indictment, based upon 12 U. S. Code Supplement, Section 1703 as amended, or the regulations of the Federal Housing Commissioner and if the latter, what section or sections were allegedly violated?

123. Is the prosecution of Count 22 of the Indictment, based upon 12 U. S. Code Supplement, Section 1703 as amended, or the regulations of the Federal Housing Commissioner and if the latter, what section or sections were allegedly violated?

124. Is the prosecution of Count 23 of the Indictment, based upon 12 U. S. Code Supplement, Section 1703 as amended, or the regulations of the Federal Housing Commissioner and if the latter, what section or sections were allegedly violated?

125. Is the prosecution of Count 24 of the Indictment, based upon 12 U. S. Code Supplement, Section 1703 as amended, or the regulations of the Federal Housing Commissioner and if the latter, what section or sections were allegedly violated?

126. Is the prosecution of Count 25 of the Indictment, based upon 12 U. S. Code Supplement, Section 1703 as amended, or the regulations of the Federal Housing Commissioner and if the latter, what section or sections were allegedly violated?

127. Is the prosecution of Count 26 of the Indictment, based upon 12 U. S. Code Supplement, Section 1703 as amended, or the regulations of the Federal Housing Commissioner and if the latter, what section or sections were allegedly violated?

128. Is the prosecution of Count 27 of the Indictment, based upon 12 U. S. Code Supplement, Section 1703 as amended, or the regulations of the Federal Housing Commissioner and if the latter, what section or sections were allegedly violated?

129. Is the prosecution of Count 28 of the Indictment, based upon 12 U. S. Code Supplement, Section 1703 as amended, or the regulations of the Federal Housing Commissioner and if the latter, what section or sections were allegedly violated?

130. Is the prosecution of Count 29 of the Indictment, based upon 12 U. S. Code Supplement, Section 1703 as amended, or the regulations of the Federal Housing Commissioner and if the latter, what section or sections were allegedly violated?

131. Is the prosecution of Count 30 of the Indictment, based upon 12 U. S. Code Supplement, Section 1703 as amended, or the regulations of the Federal Housing Commissioner and if the latter, what section or sections were allegedly violated?

132. Is the prosecution of Count 31 of the Indictment, based upon 12 U. S. Code Supplement, Section 1703 as amended, or the regulations of the Federal Housing Commissioner and if the latter, what section or sections were allegedly violated?

133. Is the prosecution of Count 32 of the Indictment, based upon 12 U. S. Code Supplement, Section 1703 as amended, or the regulations of the Federal Housing Commissioner and if the latter, what section or sections were allegedly violated?

134. Is the prosecution of Count 33 of the Indictment, based upon 12 U. S. Code Supplement, Section 1703 as amended, or the regulations of the Federal Housing Commissioner and if the latter, what section or sections were allegedly violated?

135. Is the prosecution of Count 34 of the Indictment, based upon 12 U. S. Code Supplement, Section 1703 as amended, or the regulations of the Federal Housing Commissioner and if the latter, what section or sections were allegedly violated?

136. Is the prosecution of Count 35 of the Indictment, based upon 12 U. S. Code Supplement, Section 1703 as amended, or the regulations of the Federal Housing Commissioner and if the latter, what section or sections were allegedly violated?

137. Is the prosecution of Count 36 of the Indictment, based upon 12 U. S. Code Supplement, Section 1703 as amended, or the regulations of the Federal Housing Commissioner and if the latter, what section or sections were allegedly violated?

138. Is the prosecution of Count 37 of the Indictment, based upon 12 U. S. Code Supplement, Section 1703 as amended, or the regulations of the Federal Housing Commissioner and if the latter, what section or sections were allegedly violated?

139. Is the prosecution of Count 38 of the Indictment, based upon 12 U. S. Code Supplement, Section 1703 as amended, or the regulations of the Federal Housing Commissioner and if the latter, what section or sections were allegedly violated?

140. Is the prosecution of Count 39 of the Indictment, based upon 12 U. S. Code Supplement, Section 1703 as amended, or the regulations of the Federal Housing Commissioner and if the latter, what section or sections were allegedly violated?

141. Is the prosecution of Count 40 of the Indictment, based upon 12 U. S. Code Supplement, Section 1703 as amended, or the regulations of the Federal Housing Commissioner and if the latter, what section or sections were allegedly violated?

142. Is the prosecution of Count 41 of the Indictment, based upon 12 U. S. Code Supplement, Section 1703 as amended, or the regulations of the

Federal Housing Commissioner and if the latter, what section or sections were allegedly violated?

Dated this 25th day of August, 1950.

/s/ EUGENE L. WOLVER,
Attorney for Defendant,
Al Freed.

[Endorsed]: Filed August 28, 1950.

At a stated term, to wit: The September Term A.D. 1950, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday, the 25th day of September, in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable Leon R. Yankwich,
District Judge.

[Title of Cause.]

MINUTE ORDER SEPTEMBER 25, 1950

For (1) ruling on (A) motions of Def't Rosenberg, filed July 7, 1950, and Aug. 9, 1950, to dismiss and quash counts 15 and 36; (B) motions of Def't Young, filed July 7, 1950, and Aug. 9, 1950, to dismiss and quash counts 15, 28, 29, 33, 38; (C) motions of Defendants Greenblatt, Freed, and Schoenfeld, filed July 7, 1950, and Aug. 9, 1950, to dismiss and quash counts 2, 3, 4, 6, 7, 9, 10 to 14 incl., 16, 20, 21, 22, 25, 26, 27, 31, 35, 36, 39, 40;

(D) motion of Def't Johnsen, filed Aug. 28, 1950, to dismiss and quash all counts; (E) motion of Def't Borock, filed Aug. 28, 1950, to dismiss and quash count 31; (F) motion of Defendants R. Kushner, Warren, M. Kushner, Alterman, and Premazon, filed Sept. 6, 1950, to dismiss and quash all counts; (2) argument on (A) motion of Fred Johnsen, filed Aug. 28, 1950, for Bill of Particulars; (B) motion of Al Freed, filed Aug. 28, 1950, for Bill of Particulars; and (3) fixing time for pleas;

Leonard Low, Esq., appearing as counsel for Defendants Ralph Kushner, M. Kushner, Elmer Alterman, Rubin Premazon, and Ben J. Warren;

Harold Judson, Esq., appearing as counsel for defendant Ben Greenblatt; Eugene L. Wolver, Esq., appearing as counsel for defendants Al Freed, Bernard Schoenfeld (for whom Sorrell Troppe, Esq., is also appearing), Samuel J. Young, and Josef Rosenberg; H. F. Poyet, Esq., appearing as counsel for defendant Fred Johnsen; Jos. Friedman, Esq., appearing as counsel for defendants Sid Ulan-sky and Philip N. Borock; Edward Stanton, Esq., appearing as counsel for defendant Herman M. Pearl; all of the said defendants are on bond and not present;

Attorneys Wolver and Poyet argue to the Court re Bill of Particulars, and R. M. Steele, Ass't U. S. Att'y, appearing as counsel for Gov't, makes a statement re Gov't's position. Court orders motions for Bill of Particulars denied.

The Court states that the Statute of Limitations

has not run against any of the counts of the Indictment and makes a statement of the reasons, and orders that each of the motions to dismiss is denied.

On motion of Attorney Judson it is ordered that the cause is continued to Oct. 30, 1950, 10 a.m., for pleas of all defendants.

At a stated term, to wit: The September Term, A.D. 1950, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday, the 30th day of October, in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable Leon R. Yankwich,
District Judge.

[Title of Cause.]

MINUTE ORDER OCTOBER 30, 1950

For plea of all fourteen defendants; R. M. Steele, Ass't U. S. Att'y, appearing as counsel for Gov't; Joseph Stone, Esq., appearing as counsel for defendants Ralph Kushner, M. Kushner, Elmer Alterman, Rubin Premazon, and Ben J. Warren; Harold Judson, Esq., appearing as counsel for defendant Ben Greenblatt; Eugene L. Wolver, Esq., appearing as counsel for defendants Al Freed, charged as Albert Freed; Samuel J. Young, charged as Sam-Josipovic, for whom Chas. H. Carr, Esq., also

appears; and defendant Josef Rosenberg, charged as Joseph Rosenberg, for whom Chas. H. Carr, Esq., also appears; Burke Mathes, Esq., appearing as counsel for defendant Fred Johnsen; Sorrell Trope, Esq., appearing as counsel for defendant Bernard Schoenfeld; Joseph Friedman, Esq., appearing as counsel for defendants Sid Ulansky and Philip N. Borock, charged as Philip M. Borock; Edward Stanton, Esq., appearing as counsel for defendant Herman M. Pearl; all of the said fourteen defendants being present on bond at 10 a.m., except defendant M. Kushner, who appears at 10:45 a.m.

On motion of Attorney Wolver, and agreement by defendants, it is ordered that Chas. H. Carr, Esq., is substituted in place of Attorney Wolver as counsel for defendants Josef Rosenberg and Samuel J. Young. Appearance praecipe Attorney Carr is filed.

All counsel waive reading of Indictment. Each defendant, except M. Kushner, who is not present, pleads not guilty to each count in which he is charged, to wit: Defendants Ralph Kushner, Ben Greenblatt, Al Freed, Fred Johnsen, and Bernard Schoenfeld in counts 1 to 41, inclusive; defendant Samuel J. Young in counts 1, 15, 28, 29, 33, 38; defendant Elmer Alterman in counts 1, 3, 14, 19; Sid Ulansky in counts 1 and 18; defendant Rubin Premazon in counts 1 and 8; defendant Herman M. Pearl in counts 1 and 17; Josef Rosenberg in counts 1, 15, and 36; defendant Philip N. Borock in counts 1, 30, 31, 32, 37; defendant Ben J. War-

ren in counts 1, 5 to 13, inclusive, 20, 23, 25, 26, 27, 39.

Court orders cause continued to October 31, 1950, 10 a.m., for plea of defendant M. Kushner, who is charged in counts 1 and 24.

Court orders jury trial of defendants who are present this date set for February 13, 1951, 10 a.m.

At 10:45 a.m. defendant M. Kushner is present. Court orders that continuance for his plea is set aside. Attorney Stone, in behalf of said defendant, waives reading of Indictment and said defendant pleads not guilty to each of counts 1 and 24. Court orders trial of defendant M. Kushner set for February 13, 1950, 10 a.m.

District Court of the United States for the Southern
District of California, Central Division

No. 21,377 Criminal

41 Count Indictment, 12 USC 1731(a)

UNITED STATES OF AMERICA,

vs.

AL FREED, Charged as Albert Freed.

JUDGMENT AND COMMITMENT

On this 4th day of June, 1951, came the attorney for the government and the defendant appeared in person and by counsel, Eugene L. Wolver, Esq.

It Is Adjudged that the defendant has been convicted upon his plea of Nolo Contendere to each

of counts 2 and 4 of the offenses of (ct 2) that on or about February 6, 1947, in Los Angeles County, Calif., defendant did prepare and present a credit application to the Bank of America N.T.&S.A., with intent such loan be insured by the Federal Housing Administration, representing said credit was for purchase of materials for additions to a dwelling house, defendant then knowing said statement was false in that the loan was to be used for purchase of materials for construction of a new dwelling house; (count 4 charges violation similar to count 2 occurring on or about January 27, 1947), as charged in said Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of six months in an institution of the jail type on Count 2 and pay unto the United States of America a fine of \$1,000.00 on Count 4; and stand committed to an institution of the jail type until said fine is paid or he is discharged therefrom by due process of law.

It Is Further Ordered that execution of said sentence on each count is stayed until 5 p.m., June 20, 1951.

It Is Further Ordered that each of Counts 1, 3,

and 5 to 41, inclusive, is hereby dismissed as to defendant Al Freed.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ LEON R. YANKWICH,
United States District Judge.

[Endorsed]: Filed June 4, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant: Al Freed, 5532 Sierra Vista Avenue, Los Angeles, California.

Name and address of appellant's attorney: Eugene L. Wolver, 310 Ohio Oil Building, 437 South Hill Street, Los Angeles, California.

Offense: Violation of U.S.C. Title 18, Section 88, (1946 Ed.); U.S.C. Title 12, Section 1731(a) (9 F. R. 7253, et seq., 12 F. R. 4369, et seq.—conspiracy to commit offenses against the United States; conspiracy to defraud the United States; conspiracy to make, pass, utter and publish false statements re F.H.A. Title I loan applications).

Concise statement of judgment: Confined to jail for a period of six months on Count Two of the

Indictment, plus a fine of \$1,000.00 on Count Four of the Indictment.

Name of institution where now confined, if not on bail: Now on Bail.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above-stated judgment.

Dated this 14th day of June, 1951.

/s/ AL FREED,
Appellant.

/s/ EUGENE L. WOLVER,
Attorney for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed June 14, 1951.

In the United States District Court, Southern
District of California, Central Division

No. 21377-CD

UNITED STATES OF AMERICA,
Plaintiff,
vs.

RALPH KUSHNER, et al.,
Defendants.

Honorable Leon R. Yankwich, Judge Presiding.

REPORTER'S PARTIAL TRANSCRIPT
OF PROCEEDINGS

September 11, 1950

Appearances:

For the Plaintiff:

ERNEST A. TOLIN,
United States Attorney, by
RAY M. STEELE,
Assistant United States Attorney.

For the Defendants Ralph Kushner, M. Kushner, Elmer Alterman, Rubin Premazon and Ben J. Warren:

JOSEPH STONE.

For the Defendants Al Freed, Bernard Schoenfeld, Samuel J. Young and Josef Rosenberg:

EUGENE L. WOLVER, and
SORREL TROPE.

For the Defendant Ben Greenblatt:

HAROLD JUDSON.

For the Defendant Fred Johnsen.

BURKE MATHES, and

HENRY F. POYET.

For the Defendants Sid Ulansky and Philip
N. Borock:

JOSEPH FRIEDMAN.

For the Defendant Herman M. Pearl:

EDWARD B. STANTON.

Monday, September 11, 1950—10:00 A.M.

STATEMENTS AND RULINGS
OF THE COURT

The Court: I have just seen the supplement. I think I will make a statement, gentlemen. This is a branch of law with which I am very familiar. We might as well start in with an understanding of the problems. The Ninth Circuit Court of Appeals recently in an opinion in the Bridges case, while it was not in other respects noted for this fact, through Judge Nealy pointed to the fact that that question was involved in that case. And he gave the state of the law on the subject of the statute of limitations, referring to *Marzani v. United States*, 1947, U. S. App. D. C., 168 F. 2d. 133, on which counsel here rely, which was con-

firmed merely by a divided court, and the later case, the Godfried case,—

Mr. Wolver: That is an earlier case.

The Court: The other case, *U. S. v. Godfried*, 1948, 2 Cir., 165 F. 2d. 360, took a different view, and a writ of certiorari was denied. On that state of the law each of us is free to draw any conclusion he desires from the particular opinions and their application to a particular case.

My own view of the law is that the word “fraud” used in a suspension statute is used in the sense which the Supreme Court of the United States has always interpreted that word to mean, and that is that it is not limited merely to property or pecuniary loss. In other words, Mr. Chief Justice Taft in *Hammerschmidt v. U. S.*, 1924, 265 U. S. 182, said that when you talk about fraud in the United States, fraud may consist in actual pecuniary loss or in depriving the government of the United States of independence of action on the part of its officers through certain means and devices, although no pecuniary loss exists.

In other words, if, for instance, you presented a false statement which resulted in an officer of the United States acting on a matter where he would not otherwise act, that is a fraud on the United States. That has been the law ever since the word “fraud” was interpreted. So that I personally am inclined to agree with the Second Circuit to the effect that the word “fraud” in these suspensory statutes is not to be limited to cases of pecuniary loss.

Having read your briefs and your memoranda and having read other things and being familiar with this branch of the law, I am stating that is my conclusion and I would not follow the Marzani case. I would rather follow the other one.

I choose to follow the reasoning which is more consistent with the history of the law. In Federal statutes fraud has been much broader than fraud under the state statutes. Repeatedly the courts have held that the interpretation has been very broad. I, myself, during the days of rationing found no difficulty in applying the various sections relating to fraudulent presentation of instruments, of coupons and the like.

One of the most interesting cases that arose in this court was the case of *Mosca v. U. S.*, 1945, 2 Cir., 174 F. 2d. 448. Incidentally, a former United States attorney appeared for Mr. Mosca. Mr. Mosca had manipulated the securing of sugar by means of checks. I do not know whether you remember when sugar was handled by manufacturers like a checking account. They sent through the bank a demand for so much sugar and the presumption was that they had presented the coupons to cover it. Mr. Carr argued before me and before the higher court that that was not an instrument and the government had called it a bill of exchange.

I held it did not make any difference what it was, I thought it was really a draft against a fund. It was an instrument which initiated a proceeding which resulted in obtaining something, just as you

would draw against a fund. The Circuit affirmed me in that interpretation. So I am stating to you what my reaction is on the state of the law as I find it.

The Marzani case is an interpretation in the light of so-called legislative history. I have had enough to do with legislatures in my early career to know that legislative history does not mean anything.

Many times to have followed legislative history would have destroyed the Mann Act, which never would have been enforced if we followed legislative history. Remember in that case Mr. Mann, himself, appeared before the Supreme Court and said that Act was intended to cover only commercialized prostitution, and not intended to cover the case of somebody just being pleasure bent, as in *Caminetti v. U. S.*, 1917, 242 U. S. 70.

Mr. Justice Holmes said he was not interested in what they intended to do. They made the language broad enough to cover those other instances. Legislative history does not in itself resolve the question because many times they intended to do one thing and they do exactly another. When the language they use has a specific meaning in law they are presumed to have passed the legislation with that meaning in view. So I would not follow the Marzani case.

* * *

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the

United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 2nd day of October, A.D. 1950.

/s/ VIRGINIA K. PICKERING,
Official Reporter.

[Endorsed]: Filed April 4, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 136, inclusive, contain the original Indictment; Notice of Motion; Motion to Dismiss and Quash and Points and Authorities of Al Freed, et al.; Notice to Dismiss and Quash of Fred Johnsen; Affidavit of Fred Johnsen in Support of Motion to Dismiss and Quash; Motion to Dismiss and Quash and Points and Authorities of Ralph Kushner, et al.; Supplement to Brief of Law; Motion for Bill of Particulars; Judgments and Commitments as to Al Freed, Fred Johnsen and Ralph Kushner; Notices of Appeal of Al Freed,

Fred Johnsen and Ralph Kushner and Designations of Record on Appeal and a full, true and correct copy of minute orders entered September 25, 1950; October 30, 1950, and April 24, 1951, which, together with copy of reporter's transcript of proceedings on April 11, 1950, (partial) and April 24, 1951, (partial), transmitted herewith, constitute the record on appeals to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$4.80 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 20th day of July, A.D. 1951.

[Seal] EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 13023. United States Court of Appeals for the Ninth Circuit. Al Freed, Fred Johnson and Ralph Kushner, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed July 23, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
in and for the Ninth Circuit

No. 13023

UNITED STATES OF AMERICA,
Plaintiff and Appellee,

vs.

RALPH KUSHNER, et al.,
Defendants,

AL FREED,
Defendant and Appellant.

STATEMENT OF POINTS OF APPEAL AND
DESIGNATION OF RECORD

(Rule 19, Paragraph 6, Rules of Court)

To Paul J. O'Brien, Clerk of the Above-Entitled
Court:

Please Take Notice, that pursuant to Rule 19,
Paragraph 6 of the Rules of Practice of the above-
entitled court, Appellant, Al Freed, makes the fol-
lowing statement and designation:

1. Statement of Grounds and Legal Points of
Appeal:

That the only grounds and legal points of appeal
hereafter to be presented by said appellant is that
Counts Two and Four of the Indictment herein to
which said Appellant heretofore plead "Nolo Con-
tendere" are:

(a) Each and both are barred by the Stat-

ute of Limitations, to wit: 18 U. S. Code Annotated, Section 3282.

(b) That Court Four of said Indictment does not state facts sufficient to constitute a public offense in that it is not therein alleged that in the application, there was any "applying for or requesting credit" in any specified amount.

2. Designation of Record Material for Consideration of Said Grounds:

Said Appellant hereby designates the following as that portion of the record which is material for the consideration of said appeal or review:

(a) Counts Two and Four of the Indictment.

(b) Notice of and Motion to Dismiss and Quash, dated the 7th day of August, 1950.

(c) Points and Authorities in support of said motion to dismiss and quash.

(d) Supplement to points and authorities in support of said motion to dismiss and quash.

(e) Notice of and motion for Bill of Particulars, dated the 25th day of August, 1950.

(f) Statements and rulings of the court on the 11th day of September, 1950, at the time of the submission to said court of said motion to dismiss and quash.

(g) Minute Order and ruling on said motions to dismiss and quash and for Bill of Particulars made on or about the 25th day of September, 1950.

(h) Original plea of defendant and Appellant, Al Freed, to Counts Two and Four of the Indictment.

(i) Change of plea of Al Freed, to said Counts Two and Four of the Indictment to Nolo Contendere.

(j) Sentence imposed on said defendant and Appellant, Al Freed, on June 4, 1951.

(k) Notice of Appeal, filed June 14, 1951.

(l) The Designation of Record on Appeal.

Dated this 3rd day of August, 1951.

Respectfully submitted by

/s/ EUGENE L. WOLVER,

Attorney for Defendant and
Appellant, Al Freed.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 6, 1951.

No. 13023

United States
Court of Appeals
for the Ninth Circuit.

AL FREED, FRED JOHNSEN and RALPH
KUSHNER,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

SUPPLEMENTAL
Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division.

FILED

DEC 12 1951

No. 13023

United States
Court of Appeals
for the Ninth Circuit.

AL FREED, FRED JOHNSEN and RALPH
KUSHNER,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

SUPPLEMENTAL
Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant Al Freed:

EUGENE L. WOLVER,
437 S. Hill St.,
Los Angeles 13, Calif.

For Appellant Fred Johnson:

HAROLD JUDSON,
530 West 6th St.,
Los Angeles, Calif.,

HENRY F. POYET,
2815 Allesandro St.,
Los Angeles, Calif.,

BURKE MATHES,
453 S. Spring St.,
Los Angeles, Calif.

For Appellant Ralph Kushner:

LOW & STONE,
747 S. Hill St.,
Los Angeles 14, Calif.

For Appellee :

ERNEST A. TOLIN,
United States Attorney,

RAY H. KINNISON,
NORMAN W. NEUKOM,
RAY M. STEELE,

Assistants U. S. Attorney,
600 U. S. Post Office & Court House Bldg.,
Los Angeles 12, Calif.

In the United States District Court in and for
the Southern District of California, Central
Division

No. 21377 CD

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RALPH KUSHNER, BEN GREENBLATT, AL-
BERT FREED, FRED JOHNSON, BER-
NARD SCHOENFELD, FRANK METH,
SAM JOSIPOVIE, M. KUSHNER, ELMER
ALTERMAN, SID ULANSKY, RUBIN PRE-
MAZON, HERMAN M. PEARL, JOSEPH
ROSENBERG, PHILIP M. BOROCK, and
BEN WARREN, aka BEN J. WARREN,

Defendants.

INDICTMENT

U.S.C. Title 18, Sec. 88, (1946 Ed.); U.S.C. Title
12, Sec. 1731 (a) (9 F. R. 7253 et seq., 12 F. R.
4369 et seq.—Conspiracy to Commit Offenses
Against the United States; Conspiracy to De-
fraud the United States; Conspiracy to Make,
Pass, Utter, and Publish False Statements
re F.H.A. Title I Loan Applications.

The grand jury charges:

* * *

Count Three

(1731 (a), Title 12 U.S.C.)

On or about April 5, 1947, in Los Angeles County, California, within the Central Division of the Southern District of California, the defendants Ben Greenblatt, Albert Freed, Ralph Kushner, Fred Johnsen, Elmer Alterman, and Bernard Schoenfeld, for the purpose of obtaining a loan and an advance of credit from a corporation, namely, the Bank of America National Trust and Savings Association, with the intent that such loan and advance of credit should be offered to and accepted by the Federal Housing Administration for insurance, under the provisions of Title I of the National Housing Act, Title 12 of the United States Code Supplement, Section 1703 as amended, and regulations of the Federal Housing Commissioner governing property improvement loans issued thereunder, (9 F. R. 7253 et seq., as amended), did make, pass, utter, and publish, and did cause to be made, passed, uttered and published, a statement, knowing the same to be false in that the defendants did prepare and present and did cause to be prepared and did cause to be presented, to the Bank of America National Trust and Savings Association, a written Federal Housing Administration Title I Credit application for a property improvement loan containing the signatures of William J. Bradford and Dorothy W. Bradford, as borrowers, said application applying for and requesting credit in the amount of \$2,000.00, and said application stating and representing that

said credit was to be used for the purchase of materials for additions and improvements to a dwelling house located at 13204 Louvre, Pacoima, California, the defendants then knowing that the said statement was false in that the defendants then knew that the loan and credit so applied for was not be used for the purchase of materials for additions and improvements to a dwelling house at the aforesaid address nor for additions and improvements to any dwelling house, but was to be used for the purchase of materials for the construction of a new dwelling house.

* * *

Count Nineteen

[U.S.C., Title 12, Sec. 1731 (a)]

On or about July 17, 1947, in Los Angeles County, California, within the Central Division of the Southern District of California, the defendants Ben Greenblatt, Albert Freed, Ralph Kushner, Fred Johnsen, Elmer Alterman, and Bernard Schoenfeld, for the purpose of obtaining a loan and an advance of credit from a corporation, namely, the Bank of America National Trust and Savings Association, with the intent that such loan and advance of credit should be offered to and accepted by the Federal Housing Administration for insurance, under the provisions of Title I of the National Housing Act, Title 12 of the United States Code Supplement, Section 1703 as amended, and regulations of the Federal Housing Commissioner governing property improvement loans issued thereunder (12 F. R.

4369, et seq., as amended), did make, pass, utter, and publish, and did cause to be made, passed, uttered, and published, a statement, knowing the same to be false in that the defendants did prepare and present and did cause to be prepared and did cause to be presented, to the Bank of America National Trust and Savings Association, a written Federal Housing Administration Title Credit Application for a property improvement loan, containing the signatures of Burton T. Howard and Lillian M. Howard, as borrowers, said application applying for and requesting credit in the amount of \$1,750.00, and said application stating and representing that said credit was to be used for the purchase of materials for additions and improvements to a dwelling house located at 10048 Cayuga, Pacoima, California, the defendants then knowing that the said statement was false in that the defendants then knew that the loan and credit so applied for was not to be used for the purchase of materials for additions and improvements to a dwelling house at the afore-said address, nor for additions and improvements to any dwelling house, but was to be used for the purchase of materials for the construction of a new dwelling house.

* * *

Count Twenty-Three

(Title 12, U.S.C., Sec. 1731 (a))

On or about June 30, 1947, in Los Angeles County, California, within the Central Division of the Southern District of California, the defendants

Ben Greenblatt, Albert Freed, Ralph Kushner, Fred Johnsen, Ben Warren, Bernard Schoenfeld and Frank Meth, for the purpose of obtaining a loan and an advance of credit from a corporation, namely, the Bank of America National Trust and Savings Association, with the intent that such loan and advance of credit should be offered to and accepted by the Federal Housing Administration for insurance, under the provisions of Title I of the National Housing Act, Title 12, of the United States Code Supplement, Section 1703 as amended, and regulations of the Federal Housing Commissioner governing property improvement loans issued thereunder (9 F. R. 7253 et seq., as amended), did make, pass, utter, and publish, and did cause to be made, passed, uttered and published, a statement knowing the same to be false in that the defendants did prepare and present and did cause to be prepared and did cause to be presented, to the Bank of America National Trust and Savings Association, a written Federal Housing Administration Title I Credit Application for a property improvement loan containing the signatures of Fred A. Clayton and Alta M. Clayton, as borrowers, said application applying for and requesting credit in the amount of \$2,000.00, and said application stating and representing that said credit was to be used for the purchase of materials for additions and improvements to a dwelling house located at 1904 Rindge Lane, Redondo Beach, California, the defendants then knowing that the said statement was false in

that the defendants then knew that the loan and credit so applied for was not to be used for the purchase of materials for additions and improvements to a dwelling house at the aforesaid address nor for additions and improvements to any dwelling house, but was to be used for the purchase of materials for the construction of a new dwelling house.

* * *

Count Thirty

(Title 12, U.S.C., Sec. 1731 (a))

On or about July 21, 1947, in Los Angeles County, California, within the Central Division of the Southern District of California, the defendants Ben Greenblatt, Albert Freed, Ralph Kushner, Fred Johnsen, Bernard Schoenfeld, Philip M. Borock for the purpose of obtaining a loan and an advance of credit from a corporation, namely, the Bank of America National Trust and Savings Association, with the intent that such loan and advance of credit should be offered to and accepted by the Federal Housing Administration for insurance, under the provisions of Title I of the National Housing Act, Title 12 of the United States Code Supplement, Section 1703 as amended, and regulations of the Federal Housing Commissioner governing property improvement loans issued thereunder (12 F. R. 4369 et seq., as amended), did make, pass, utter, and publish, and did cause to be made, passed, uttered and published, a statement, knowing the same to be false in that the defendants did prepare and present and did cause to be prepared and did

cause to be presented, to the Bank of America National Trust and Savings Association, a written Federal Housing Administration Title I Credit Application for a property improvement loan containing the signatures of Harvey L. Coleman, Minnie I. Coleman as borrowers, said application applying for and requesting credit in the amount of \$2,500.00, and said application stating and representing that said credit was to be used for the purchase of materials for additions and improvements to a dwelling house located at Corner of Almaria and Highland, Fontana, California, the defendants then knowing that the said statement was false in that the defendants then knew that the loan and credit so applied for was not to be used for the purchase of materials for additions and improvements to a dwelling house at the aforesaid address nor for additions and improvements to any dwelling house, but was to be used for the purchase of materials for the construction of a new dwelling house.

* * *

Count Thirty-Nine

(Title 12 U.S.C., Sec. 1731 (a))

On or about March 21, 1950, in Los Angeles County, California, within the Central Division of the Southern District of California, the defendants Ben Greenblatt, Albert Freed, Ralph Kushner, Fred Johnsen, Bernard Schoenfeld, and Ben Warren, for the purpose of obtaining a loan and an advance of credit from a corporation, namely, the Bank of

America National Trust and Savings Association, with the intent that such loan and advance of credit should be offered to and accepted by the Federal Housing Administration for insurance, under the provisions of Title I of the National Housing Act, Title 12 of the United States Code Supplement, Section 1703 as amended, and regulations of the Federal Housing Commissioner governing property improvement loans issued thereunder (9 F. R. 7253 et seq., as amended), did make, pass, utter, and publish, and did cause to be made, passed, uttered, and published, a statement, knowing the same to be false in that the defendants did prepare and present and did cause to be prepared and did cause to be presented, to the Bank of America National Trust and Savings Association, a written Federal Housing Administration Title I Credit Application for a property improvement loan containing the signature of John E. Bradford, as borrower, said application applying for and requesting credit in the amount of \$2,500.00, and said application stating and representing that said credit was to be used for the purchase of materials for additions and improvements to a dwelling house located at 2409 Voorhees Avenue, Redondo Beach, California, the defendants then knowing that the said statement was false in that the defendants then knew that the loan and credit so applied for was not to be used for the purchase of materials for additions and improvements to a dwelling house at the afore-said address nor for additions and improvements to any dwelling house, but was to be used for the

purchase of materials for the construction of a new dwelling house.

* * *

A True Bill,

/s/ D. C. BAILEY,
Foreman.

/s/ ERNEST A. TOLIN,
United States Attorney.

[Endorsed]: Filed June 28, 1950.

[Title of District Court and Cause.]

NOTICE TO DISMISS AND QUASH

Comes now the above-named defendant, Fred Johnsen, and moves the above-entitled court to dismiss and quash the Indictment herein; to wit, Counts One through Forty-One, both inclusive, upon the following grounds:

(a) That said Indictment on its face does not set forth sufficient facts to constitute an Indictment as contemplated by law;

(b) That Counts Two, Three, Four, Six, Seven, Nine, Ten, Eleven, Twelve, Thirteen, Fourteen, Sixteen, Twenty, Twenty-one, Thirty-five, Thirty-six, Thirty-nine, and Forty upon the ground that each and all of said Counts are barred by the Statute of Limitations and particularly Title 18, United States Code—Crimes and Criminal Procedure, Section 3282.

That this motion will be based upon said Indictment, said Code Section, upon Notice of Motion and the within Motion, and upon the Affidavits of Fred Johnsen and upon the Points and Authorities filed by the Defendant Albert Freed by and through his Attorney, Eugene L. Wolver, the copy of which is referred to herein and made a part hereof by reference as though set forth herein and adopted as Points and Authorities, together with such other documents, affidavits, points and authorities as may be presented at the date of the hearing of said motion.

Dated this 28th day of August, 1950.

BURKE MATHES, and

H. F. POYET,

By /s/ BURKE MATHES,

By /s/ H. F. POYET,

Attorneys for the above-named Defendant Fred Johnsen.

Receipt of copy acknowledged.

[Endorsed]: Filed August 28, 1950.

[Title of District Court and Cause.]

MOTION TO DISMISS AND QUASH

Come now the above-named defendants, Ralph Kushner, Ben Warren, M. Kushner, Elmer Alterman and Rubin Premazon, and move the above-entitled court to dismiss and quash the following counts of the Indictment herein, to wit: Counts Two, Three, Four, Six, Seven, Nine, Ten, Eleven, Twelve, Thirteen, Fourteen, Sixteen, Twenty, Twenty-one, Twenty-two, Twenty-five, Twenty-six, Twenty-seven, Thirty-one, Thirty-five, Thirty-six, Thirty-nine and Forty, upon the ground that each and all of said counts are barred by the Statute of Limitations and particularly Title 18, United States Code—Crimes and Criminal Procedure, Section 3282.

Further, said defendants move to dismiss Counts One through Forty-One upon the further ground that none of said counts states a cause of action in the nature of a crime or any cause of action.

That this motion will be based upon said indictment, applicable code sections and upon Points and Authorities filed herein.

Dated August 28, 1950.

LOW & STONE,

By /s/ JOSEPH STONE.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 6, 1950.

At a stated term, to wit: The September Term. A.D. 1950, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Monday the 25th day of September, in the year of our Lord, one thousand nine hundred and fifty.

Present: The Honorable Leon R. Yankwich,
District Judge.

[Title of Cause.]

MINUTE ORDER SEPTEMBER 25, 1950

For (1) ruling on (A) motions of Def't Rosenberg, filed July 7, 1950, and Aug. 9, 1950, to dismiss and quash counts 15 and 36; (B) motions of Def't Young, filed July 7, 1950, and Aug. 9, 1950, to dismiss and quash counts 15, 28, 29, 33, 38; (C) motions of Defendants Greenblatt, Freed, and Schoenfeld, filed July 7, 1950, and Aug. 9, 1950, to dismiss and quash counts 2, 3, 4, 6, 7, 9, 10 to 14 incl., 16, 20, 21, 22, 25, 26, 27, 31, 35, 36, 39, 40; (D) motion of Def't Johnsen, filed Aug. 28, 1950, to dismiss and quash all counts; (E) motion of Def't Boroeh, filed Aug. 28, 1950, to dismiss and quash count 31; (F) motion of Defendants R. Kushner, Warren, M. Kushner, Alterman, and Premazon, filed Sept. 6, 1950, to dismiss and quash all counts; (2) argument on (A) motion of Fred Johnsen, filed Aug. 28, 1950, for Bill of Particulars; (B) motion of Al Freed, filed Aug. 28, 1950, for

Bill of Particulars; and (3) fixing time for pleas;

Leonard Low, Esq., appearing as counsel for Defendants Ralph Kushner, M. Kushner, Elmer Alterman, Rubin Premazon, and Ben J. Warren;

Harold Judson, Esq., appearing as counsel for defendant Ben Greenblatt; Eugene L. Wolver, Esq., appearing as counsel for defendants Al Freed, Bernard Schoenfeld (for whom Sorrell Troppe, Esq. is also appearing); Samuel J. Young, and Josef Rosenberg; H. F. Poyet, Esq., appearing as counsel for defendant Fred Johnsen; Jos. Friedman, Esq., appearing as counsel for defendants Sid Ulansky and Philip N. Borock; Edward Stanton, Esq., appearing as counsel for defendant Herman M. Pearl; All of the said defendants are on bond and not present;

Attorneys Wolver and Poyet argue to the Court re Bill of Particulars, and R. M. Steele, Ass't U. S. Att'y, appearing as counsel for Gov't, makes a statement re Gov't's position. Court orders motions for Bill of Particulars denied.

The Court states that the Statute of Limitations has not run against any of the counts of the Indictment and makes a statement of the reasons, and orders that each of the motions to dismiss is denied.

On motion of Attorney Judson it is ordered that the cause is continued to Oct. 30, 1950, 10 a.m., for pleas of all defendants.

District Court of the United States for the Southern
District of California, Central Division

No. 21,377 Criminal

41 Count Indictment—12 U.S.C. 1731 (a)

UNITED STATES OF AMERICA,

vs.

RALPH KUSHNER.

JUDGMENT AND COMMITMENT

On this 4th day of June, 1951, came the attorney for the government and the defendant appeared in person and by counsel, Joseph Stone, Esq.,

It Is Adjudged that the defendant has been convicted upon his plea of Nolo Contendere to each of counts 2, 3, 4 of the offenses of (ct. 2) that on or about Feb. 6, 1947, in Los Angeles County, Calif., defendant did prepare and present a credit application to the Bank of America N. T. & S. A., with intent such loan be insured by the Fed. Housing Adm., representing said credit was for purchase of materials for additions to a dwelling house, defendant then knowing said statement was false in that the loan was to be used for purchase of materials for construction of a new dwelling house; (cts. 3 and 4 charge violations similar to count 2 occurring April 5, and Jan. 27, 1947, respectively as charged in said Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to

the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of six months in an institution of the jail type on Count 2, and pay unto the United States of America a fine of \$1,000.00, on count 3, and a fine of \$1,000.00, on count 4, (making a total of \$2,000.00 in fines); and stand committed to an institution of the jail type until said fines are paid or he is discharged therefrom by due process of law.

It Is Further Ordered that execution of said sentence on each count is stayed until 5 p.m., June 20, 1951.

It Is Further Ordered that each of Counts 1, and 5 to 41 inclusive, is hereby dismissed as to defendant Ralph Kushner.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ LEON R. YANKWICH,

United States District Judge.

[Endorsed]: Filed June 4, 1951.

District Court of the United States for the Southern
District of California, Central Division

No. 21,377 Criminal

41 Count Indictment—12 U.S.C. 1731 (a)

UNITED STATES OF AMERICA,

vs.

FRED JOHNSEN.

JUDGMENT AND COMMITMENT

On this 4th day of June, 1951, came the attorney for the government and the defendant appeared in person and by counsel, Harold Judson, Burke Mathes, and H. F. Poyet, Esqs.,

It Is Adjudged that the defendant has been convicted upon his plea of not guilty, and a finding of guilty as to each of counts 2, 4, 19, 23, 30 and 39, of the offenses of (ct. 2), that on or about Feb. 6, 1947, in the Los Angeles County, Calif., defendant did prepare and present a credit application to the Bank of America N.T. & S.A., with intent such loan be insured by the Fed. Housing Adm., representing said credit was for purchase of materials for additions to a dwelling house, defendant then knowing said statement was false in that the loan was to be used for purchase of materials for construction of a new dwelling house; (cts. 4, 19, 23, 30 and 39 charge violations similar to count 2), as charged in said Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced,

and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of six months in an institution of the jail type on Count 2, and pay unto the United States of America a fine of \$1,000.00 on Count 4, a fine of \$1,000.00 on Count 19, a fine of \$1,000.00 on Count 23, a fine of \$1,000.00 on Count 30, and a fine of \$1,000.00 on Count 39; said sentences on Counts 23, 30 and 39 to run concurrently with sentences on Counts 4 and 19, so that the total fine to be paid is \$2,000.00, and the Clerk is authorized to accept \$2,000.00 in full satisfaction of said fines; and defendant shall stand committed to an institution of the jail type until said fines are paid or he is discharged therefrom by due process of law.

It Is Further Ordered that execution of sentence on each count is stayed until 5 p.m., June 20, 1951.

(Note: On May 1, 1951, the Court granted motion of defendant for judgment of acquittal as to counts 1, 3, 5, 8, 9, 10, 11-18 inc., 20, 21, 22, 24-29 inc., 31-38 inc., 40 and 41. On May 4, 1951, the Court found defendant Not Guilty as charged in Counts 6 and 7.)

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and

that the copy serve as the commitment of the defendant.

/s/ LEON R. YANKWICH,
United States District Judge.

[Endorsed]: Filed June 4, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Comes now defendant, Ralph Kushner, and files this Notice of Appeal as provided by law.

1. This case is entitled United States of America, Plaintiff, vs. Ralph Kushner, et al., Defendants.

2. Appellant's name is Ralph Kushner and his address is 607 South Dunsmuir, Los Angeles, California.

3. Appliant's attorneys are Low and Stone whose address is 747 South Hill Street, Suite 301, Los Angeles 14, California.

4. Defendant and others were charged with making certain alleged false statements allegedly to obtain credit and otherwise defraud the United States in regard to the operation of the National Housing Act.

5. Defendant pleaded nola contendere to three counts being counts Two, Three and Four of the Indictment and a judgment of conviction was

entered thereon and defendant was sentenced to pay a fine of Two Thousand Dollars (\$2,000.00) and to serve six (6) months in jail. Execution of the sentence was stayed until June 20, 1951, and in accordance with the applicable provisions of the United States Code of Criminal Procedure, defendant elects not to commence serving the sentence unless required to do so by the determination of this appeal. Appellant further requests that the payment of the fine be stayed.

6. Appellant appeals from the judgment of conviction.

Dated June 13, 1951.

LOW & STONE,

By /s/ LEONARD LOW.

[Endorsed]: Filed June 13, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of Appellant: Fred Johnsen,
3710 Hauser, Los Angeles, Calif.

Name and address of Appellant's Attorneys:
Harold F. Judson, 530 West 6th St., Los
Angeles, Cal.; Henry F. Poyet, 2815 Alle-
sandro, Los Angeles, Cal.; Burke Mathes, 453
South Spring St., Los Angeles, Cal.

Offense: Causing false claims to be made to a loaning institution for the purpose of causing the F.H.A. to insure loans.

The defendant was sentenced to serve 6 months in jail on Count No. 2; to pay a fine of \$1,000.00 on Count 4; to pay a fine of \$1,000.00 on Count 19; to pay a fine of \$1,000.00 on Count 23; to pay a fine of \$1,000.00 on Count 30; and to pay a fine of \$1,000.00 on Count 39. The fine assessed on Counts 23, 30, and 39 are to run concurrently with the fines assessed on Counts 4 and 19. The fines to stand committed.

The defendant is now on bail.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above-named judgment.

HAROLD JUDSON,

HENRY F. POYET,

BURKE MATHES,

By /s/ BURKE MATHES,

Appellant's Attorneys.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 14, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 136, inclusive, contain the original Indictment; Notice of Motion, Motion to Dismiss and Quash and Points and Authorities of Al Freed et al.; Notice to Dismiss and Quash of Fred Johnsen; Affidavit of Fred Johnsen in Support of Motion to Dismiss and Quash; Motion to Dismiss and Quash and Points and Authorities of Ralph Kushner et al.; Supplement to Brief of Law; Motion for Bill of Particulars; Judgments and Commitments as to Al Freed, Fred Johnsen and Ralph Kushner; Notices of Appeal of Al Freed, Fred Johnsen and Ralph Kushner and Designation of Record on Appeal and a full, true and correct copy of minute orders entered September 25, 1950, October 30, 1950, and April 24, 1951, which, together with copy of reporter's transcript of proceedings on April 11, 1950 (partial), and April 24, 1951 (partial), transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$4.80 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 20th day of July, A.D., 1951.

[Seal] EDMUND L. SMITH,
 Clerk.

By /s/ THEODORE HOCKE,
 Chief Deputy.

[Endorsed]: No. 13023. United States Court of Appeals for the Ninth Circuit. Al Freed, Fred Johnsen and Ralph Kushner, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court, for the Southern District of California, Central Division.

Filed July 23, 1951.

 /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

No. 13023.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

AL FREED, FRED JOHNSON and RALPH KUSHNER,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

EUGENE L. WOLVER,

437 South Hill Street,
Los Angeles 13, California,

Attorney for Appellant Al Freed.

FILED

OCT 4 1951

PAUL P. O'BRIEN
CLERK

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No. 13023.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

AL FREED, FRED JOHNSON and RALPH KUSHNER,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF.

Appellant, Al Freed, plead *nolo contendere* to two counts of an Indictment, each charging him with participating in the known presentation of Federal Housing Administration applications, more than three years prior to the filing of the Indictment.

Statement of Facts.

The Appellant, Al Freed, was one of the defendants named in the Indictment, found and filed in the above entitled cause on the 28th day of June, 1950 [Tr. of Rec. pp. 3 to 6]. He, thereafter, by Motion to Dismiss and Quash [Tr. of Rec. p. 8], properly noticed for hearing [Tr. of Rec. p. 7], challenged the legal sufficiency of certain counts of said Indictment, including Counts 2 and

4, "upon the ground that each and all of said counts are barred by the Statute of Limitations and particularly Title 18, United States Code—Crimes and Criminal Procedure, Section 3282." [Tr. of Rec. p. 8.]

During the time his said Motion to Dismiss and Quash was pending, Appellant filed a Bill and Motion for Bill of Particulars, wherein he sought to factually obtain the details of the time wherein the acts complained of in each of the counts, were committed [Tr. of Rec. pp. 9-38]. The Motion to Dismiss and Quash and the Motion for Bill of Particulars were both heard by the court on September 25, 1950 [Tr. of Rec. p. 38], at which time the court denied the Motion for Bill of Particulars [Tr. of Rec. p. 39], and also denied the Motions to Dismiss and Quash [Tr. of Rec. p. 40], the learned District Court holding that the acts complained of were a "fraud" against the United States and based its holding upon said ground [Tr. of Rec. pp. 48-51].

On October 30, 1950, Appellant plead not guilty to all counts contained in the Indictment [Tr. of Rec. pp. 40-42]. Thereafter, permission being granted, the Appellant withdrew his respective pleas as to Counts 2 and 4 and thereupon, plead "*nolo contendere*" to Counts 2 and 4 [Tr. of Rec. pp. 4, 5.] On the 4th day of June, 1951, the court entered its Judgment and Commitment, adjudging that the Appellant "has been convicted upon his plea of *nolo contendere* to each of Counts 2 and 4 of the offenses of (Count 2) that on or about February 6, 1947, in Los Angeles County, California, defendant did prepare and present a credit application to the Bank of America N. T. & S. A., with intent such loan be insured by the Federal

Housing Administration, representing said credit was for purchase of materials for additions to a dwelling house, defendant then knowing said statement was false in that the loan was to be used for purchase of materials for construction of a new dwelling house; (Count 4 charges violation similar to Count 2 occurring on or about January 27, 1947), as charged in said Indictment . . .” [Tr. of Rec. pp. 42-43]. The court thereupon ordered the Appellant “committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of six months in an institution of the jail type on Count 2 and pay unto the United States of America a fine of \$1,000.00 on Count 4; and stand committed to an institution of the jail type until said fine is paid or he is discharged therefrom by due process of law” [Tr. of Rec. p. 43].

Issues.

It is respectfully submitted that the issues herein presented are as follows:

(1) Are Counts 2 and 4 of the Indictment barred by the Statute of Limitations and particularly Title 18 of the United States Code—Crimes and Criminal Procedure, Section 3282?

(2) Having plead *nolo contendere* to said counts, may the Appellant at this time, contend that such counts do not state a public offense by reason of the fact that they are barred by the Statute of Limitations?

(3) Does Count 4 state a public offense in that it is not indicated therein that the application therein described was for credit or the amount thereof?

STATEMENT OF LAW.

I.

That Counts Two (2) and Four (4) of the Indictment Are Barred by the Statute of Limitations and Particularly Title 18 of the United States Code—Crimes and Criminal Procedure, Section 3282.

Section 3281 of (Title 18) United States Code—Crimes and Criminal Procedure, as approved on June 25, 1948, and which became effective on September 1, 1948, provides that in capital offenses, the Indictment “may be found at any time without limitation.” The succeeding section, Section 3282, of said Code pertains to all offenses not capital and provides as follows:

“Offenses not capital

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within three years next after such offense shall have been committed.”

During the emergency which arose by reason of World War II, a “wartime suspension of limitation” was passed; such provision is contained in Section 3287 of said Code and provides as follows:

“When the United States is at war the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not, or (2) committed in connection with the acquisition, care, handling, custody, control or disposition of any real or personal property of the United States, or (3) Committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, can-

cellation, or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the war, or with any disposition of termination inventory by any war contractor or Government agency, *shall be suspended until three years after the termination of hostilities as proclaimed by the President or by a concurrent resolution of Congress.*" (Emphasis ours.)

The court's attention is invited to the fact that the Statute of Limitations ceased to be suspended three (3) years after the termination of hostilities, as proclaimed by the President.

On the 31st day of December, 1946, Harry S. Truman, President of the United States, issued his proclamation, as follows:

“PROCLAMATION 2714

CESSATION OF HOSTILITIES OF WORLD
WAR II

BY THE PRESIDENT OF THE UNITED STATES
OF AMERICA

A PROCLAMATION

“With God's help this nation and our allies, through sacrifice and devotion, courage and perseverance, wrung final and unconditional surrender from our enemies. Thereafter, we, together with the other United Nations, set about building a world in which justice shall replace force. With spirit, through faith, with a determination that there shall be no more wars of aggression calculated to enslave the peoples of the world and destroy their civilization, and with the guidance of Almighty Providence great gains have been made in translating military victory

into permanent peace. Although a state of war still exists, it is at this time possible to declare, and I find it to be in the public interest to declare, *that hostilities have terminated.*

Now, Therefore, I, Harry S. Truman, President of the United States of America, do hereby proclaim the *cessation of hostilities of World War II. effective twelve o'clock noon, December 31, 1946.*

In Witness Whereof, I have hereunto set my hand and caused the seal of the United States of America to be affixed.

Done at the City of Washington this 31st day of December in the year of our Lord nineteen hundred and forty-six, and of the Independence of the United States of America the one hundred and seventy-first.

HARRY S. TRUMAN.

By the President:

James F. Byrnes,

The Secretary of State." (Emphasis ours.)

This document designated P. R. Doc. (19)46-22110 was filed with the Archives of the United States on December 31, 1946, at 1:19 P. M., and appears in 12 Fed. Reg., p. 1, col. 1 (January 1, 1947).

In the first paragraph of the proclamation the President proclaims "that hostilities have terminated." In the succeeding paragraph, he proclaims "the cessation of hostilities." Both of these statements are to the same effect.

The definitions of the phrases: "cessation," "ceased," "termination" and "terminate," as found in both Webster's Unabridged and the Universal Dictionary, indicate that said words are synonymous. Both are defined as to carry the thought of putting to an end, finish or concluding. Likewise the legal definition of such words, as defined by our courts, carry the same definitions.

The court's attention is invited to the definition of the word terminate, found in 62 Corpus Juris 732, termination found in 62 Corpus Juris 753, cease, found in 14 Corpus Juris Secundum 58 and cessation, 14 Corpus Juris Secundum 347.

The court is also requested to take judicial notice of the fact that following the President's proclamation, the Armies of the United States were diminished to a peacetime basis, the surplus war supplies of the United States were sold, many of the Naval vessels of the United States were made inactive and sealed and every act was done by the Government and its Military Authorities that would reasonably indicate a position that hostilities had come to an end, had been finished and concluded.

It is therefore respectfully submitted that proclamation 2714 of the President, dated December 31, 1946, by the terms of Section 3287, makes said statute inoperative three (3) years thereafter and that the Statute of Limitations was reinstated as of the 31st day of December, 1949, more than a reasonable period prior to the founding and return of the Indictment herein, on the 28th day of June, 1950.

(a) That Said Section 3287 Is Inapplicable to the Offenses Charged in Counts Two (2) and Four (4) of the Indictment.

Said Section 3287 is limited in its application by its phraseology to three types of cases. The only one pertinent herein is the first class "involving fraud or attempted fraud against the United States or any agency thereof." It is the contention of Appellant that the offenses herein charged are not within such category. The gravamen of the offenses charged in Counts Two (2) and Four (4) of the Indictment is that the defendant "made, passed, uttered and published a statement and caused the same to be presented to the Bank of America National Trust and Savings Association . . . knowing the same to be false." The alleged falsehood was a statement that the loan and credit was to be used to purchase materials for additions to a dwelling house, but that the same was used for the construction of a new dwelling house. By its terms, the act prohibits the making, passing, uttering, publishing, preparing and presenting of a false application for credit and does not require that there be a pecuniary loss to the United States. (18 U. S. C. A., §1010.)

The question thus presented is whether Section 3287 suspending the running of the Statute of Limitations, as to the limited offenses therein set forth, principally involving fraud or attempted fraud against the United States, is applicable to the offenses herein charged. Since Section 3287 was recently adopted, most judicial interpretations are of a prior like statute, 18 U. S. C., 1940 ed., Section 590a. This section was interpreted by two diversified opinions of two Circuit Courts of Appeal.

The case of *United States v. Gottfried*, 165 F. 2d 360, involving prosecution under Section 80 of the Criminal Code, charging the defendant and his corporation with making false statements to the O.P.A. regarding the quantity of sugar used by said corporation, the Circuit Court of Appeal, for the Second Circuit District, held Section 590a to be applicable and that the action was not barred by the Statute of Limitations. However, this prosecution was commenced approximately one year prior to the President's proclamation and the active engaging in war was primarily responsible for the belated prosecution. The court holding at page 367:

“Last is the question of the statute of limitations. The indictment for making the fraudulent statement was filed on January 28, 1946, more than three years after the crime had been committed—April 29th, 1942—; and, was concededly barred unless the Act of 1942, as amended in 1944, extended the time. The act provided that in three classes of crimes the prosecution should not be barred, until three years after hostilities had ended; and of these three the first was those ‘involving defrauding or attempts to defraud the United States or any agency thereof.’ The argument—drawn from the Congressional debates—is that this language should be confined to frauds of those who contracted with the United States or supplied it with materials, and that it does not include interference even though fraudulent which results in no pecuniary loss. Textually this reasoning has nothing to commend it, except so far as the word, ‘fraud,’ many imply pecuniary loss; and, whatever might be said as a new matter for so circumscribing that word, it has been the law, at least since

1910, that in the statute under which this indictment was drawn, 'fraud' includes any conduct, 'calculated to obstruct or impair its' (the United States') 'efficiency and destroy the value of its operations and reports.' We see no reason for reading the words, 'defrauding the United States' in the statute of limitations now in question less comprehensively; certainly there was not enough ground for that in the debates of Congress. *Besides, the purpose of the amendment was not to let crimes pass unpunished which had been committed in the hurly-burly of war, an overriding motive which perfectly fits the situation at bar.*" (Emphasis ours.)

The subsequent case of *Marzani v. United States*, 168 F. 2d 133, involved the making of false statements to Governmental agencies as to the qualifications and eligibility of the defendant to Government employment. This prosecution was likewise under Section 80 of the Criminal Code, commonly designated "False Claims Act." In it, a new issue was raised, namely, did the act complained of, constitute a fraud of the United States? Both the District Court, in 71 Fed. Supp. 615 and the Circuit Court, for the District of Columbia, held that the Suspension Act did not apply, since pecuniary loss to the United States was not an essential element to the offense, holding at page 136:

"It necessarily follows, in our view, that the Suspension Act does not apply to offenses under the False Claims Act. The Supreme Court has clearly said (1) that a statute identical in pertinent part with the Suspension Act does not apply to offenses of which defrauding the United States in a pecuniary way is not an essential ingredient; and (2) that such

defrauding of the United States is not an essential ingredient of offenses under the False Claims statute. If perjury on an official document required to be filed under a federal statute, the making of false income tax returns and an attempt to evade taxes are not defrauding of the United States within the meaning of a statute of limitations, we do not see how making a false statement in the course of an inquiry into one's qualifications for federal employment can be . . .

"The difficulty with the foregoing contention is that it ignores the plain rulings in *Noveck* and kindred cases. These cases involved false statements, under oath. The offenses tended to obstruct, by dishonest means, the operation of a department of the Government. The Court held that the Suspension Act (actually an identical predecessor) does not apply to such offenses. So that even if the False Claims Act does involve the sort of fraud the Government says it does, the Suspension Act does not apply; the rulings in the *Noveck* and similar cases related to precisely that same sort of fraud. Despite the vigor and skill with which the Government's contention is pressed upon as by its counsel, we can see no escape from that conclusion. It follows that we are of opinion that the first nine counts of this indictment were barred by the statute of limitations, and the defendant's motion that they be dismissed should have been granted."

This case was received by the Supreme Court on a Writ of Certiorari (335 U. S. 895) which made the following memorandum:

"December 20, 1948. *Per Curiam*: The judgment is affirmed by an equally divided Court. Mr. Justice

Douglas took no part in the consideration or decision of this case.”

Subsequently (336 U. S. 910), the court made the following memorandum:

“February 7, 1949. 335 U. S. 895, *ante*, 431, 69 S. Ct. 299. The petition for rehearing is granted and the case is ordered restored to the docket for reargument. Mr. Justice Douglas took no part in the consideration or decision of this application.”

The last memorandum of such case is found in 336 U. S. at page 922, wherein the Supreme Court made the following conclusion:

“March 7, 1949. *Per Curiam*: Upon hearing, the judgment entered December 20, 1948, affirming the judgment by an equally divided Court, is adhered to and reaffirmed by an equally divided Court. Mr. Justice Douglas took no part in the consideration or decision of this case.”

Standing on their own footing, the cases relied upon in *Marzani v. United States*, *supra*, have a persuasive effect upon the subject matter herein discussed.

Although these cases discuss principally, false statements made in regard to the taxation laws of the United States, they discuss such laws and the question of the application of the Suspension Act of the statute of limitations, in regard thereto, upon the broad principle of whether or not pecuniary loss is an element of the offense. The conclusion reached by said cases is that pecuniary loss is not essential to the offense and need not be alleged in the charge. They also point out that the defrauding

of the United States is not the act prohibited but the interference with the orderly function of the Government caused by false statements, is the situation which the act seeks to remedy and prohibit.

The logical and natural conclusion arrived at from such authorities is that the Suspension Act (Sec. 3287), by its wording, does not deal with statutes having such purposes, but deal with those prohibiting frauds on the Government and wherein the element of defrauding is an essential and necessary element.

Marzani v. United States, *supra*, discusses: *United States v. Noveck*, 271 U. S. 201; *United States v. McElvain*, 272 U. S. 633; *United States v. Scharton*, 285 U. S. 518, and *United States v. Gilliland*, 312 U. S. 86, and reviews said cases at page 135 as follows:

“The question before us is whether the Suspension Act applies to offenses under the False Claims Act.

“We see no escape from the conclusion impelled by two decisions of the Supreme Court, *United States v. Noveck* (and its companion cases, *United States v. McElvain* and *United States v. Scharton*) and *United States v. Gilliland*.

“In *United States v. Noveck*, the question was whether a statute which read, ‘That in offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, * * * the period of limitation shall be six years,’ applied to perjury in an income tax return. The indictment alleged that the perjury was for the ‘purpose of defrauding the United States.’ The Supreme Court held that the six-year statute did not apply, because

defrauding the United States is not an element of the crime of perjury. The language of that statute of limitations is the same as that of the Suspension statute here involved; in fact, that statute was the predecessor to this one.

“In *United States v. McElvain, supra*, the Court held that the six-year statute of limitations involved in *United States v. Noveck* did not apply to a conspiracy to defraud the United States by making a false income tax return. In *United States v. Schar-ton, supra*, the indictment was for an attempt to evade taxes by falsely understating taxable income. The defendant pleaded the statute of limitations. The United States contended that attempts to obstruct or defeat the lawful functions of any department of the Government if accompanied by dishonest methods, are attempts to defraud the United States. The Court held that the six-year limitation applicable to offenses involving the defrauding of the United States, was not applicable to the offense described in that indictment.

“The United States seems to agree with the foregoing view of the *Noveck* and its allied cases. It says that the Suspension Act ‘was modeled upon the proviso’ in the 1921 Act; that the 1921 and 1926 provisos ‘are in all essential respects identical with’ the present Suspension Act; and that ‘said cases were decided in accord with the principle first enunciated in *United States v. Noveck*, to wit, that in order to be affected by the suspension statute ‘defrauding or an attempt to defraud’ the United States must be an ingredient under the statute defining the offense.’

“In *United States v. Gilliland, supra*, the question was whether the False Claims Act was restricted to

matters in which the Government has some financial or proprietary interest. The Court held that it was not. The conclusion was premised largely on the fact that by amendment in 1934 Congress had eliminated from the statute as it had theretofore existed the words 'or for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States,' and in legislative history of the amending act showed that this omission was deliberate and intentional. Thus, the Court held that defrauding the United States in a pecuniary or financial sense is not a constituent ingredient of offenses under the False Claims Act."

Basing their opinion upon *United States v. Noveck* and *United States v. McElvain* (both discussed in *Marzani v. United States, supra*) on December 20, 1950, the United States Court of Appeals for the Second Circuit, by almost the identical bench that decided *United States v. Gottfried, supra*, again ruled upon the question of the applicability of the Suspension Act, upon a charge of making a false statement. In the case of *United States v. Obermeier*, 186 F. 2d 243, wherein the defendant, while under oath, made false statements to a United States Naturalization Examiner, the court interpreted the present Section 3287 and held on page 256 as follows:

"The government contends, however, that, in any event the War Time Suspension of Limitations Act preserved its right to prosecute this action. That Act, so far as pertinent, is substantially the same as the Acts interpreted by the Supreme Court in *United States v. Noveck*, 271 U. S. 201, 46 S. Ct. 476, 70 L. Ed. 904; *United States v. McElvain*, 272 U. S. 633, 47 S. Ct. 219, 71 L. Ed. 451, and *United States*

v. Scharton, 285 U. S. 518, 52 S. Ct. 416, 76 L. Ed. 917. *As so interpreted, it suspends a statute of limitations only when fraud or attempted fraud against the United States (or one of its agencies) 'is an ingredient under the statute defining the offense,' and does not, absent such a statutory definition, apply to perjury or false swearing, even when the United States is directly interested. Nothing in 8 U. S. C. A., Section 746(a)(1), under which defendant was indicted, makes fraud an ingredient of the crime.*" (Emphasis ours.)

In supporting such law, the court cites the following authorities:

"In U. S. v. Gilliland, 312 U. S. 86, 61 S. Ct. 518, 85 L. Ed. 598, the offense was so defined as to make fraud an ingredient. So, too, in Gottfried v. U. S., 2 Cir., 165 F. 2d 360 as we there interpreted the statute creating the crime. See also Marzani v. U. S., 83 U. S. App. D. C. 78, 168 F. 2d 133."

The court's attention is respectfully invited to the fact that the court that decided the *Gottfried* case, subsequently based its ruling in the *Obermeier* case, upon the decision of *Marzani v. United States, supra*.

Title 18, United States Code—Crimes and Criminal Procedure, Section 1010, defining the crime herein charged, does not make fraud or attempted fraud, against the United States or one of its agencies, an ingredient of the offense. Such section provides as follows:

"Federal Housing Administration transactions:

Whoever, for the purpose of obtaining any loan or advance of credit from any person, partnership, association, or corporation with the intent that such loan

or advance of credit shall be offered to or accepted by the Federal Housing Administration for insurance, or for the purpose of obtaining any extension or renewal of any loan, advance of credit, or mortgage insured by such Administration, or the acceptance, release, or substitution of any security on such a loan, advance of credit, or for the purpose of influencing in any way the action of such Administration, makes, passes, utters, or publishes any statement, knowing the same to be false, or alters; forges, or counterfeits any instrument, paper, or document, or utters, publishes, or passes as true any instrument, paper, or document, knowing it to have been altered, forged, or counterfeited, or willfully overvalues any security, asset, or income, shall be fined not more than \$5,000 or imprisoned not more than two years, or both."

In the case of *United States v. Mellen*, 96 F. 2d 462, which, likewise in the case alleged herein, a violation of the prior law, 18 U. S. C. A., section 80, by the filing of known false credit applications contrary to the rules of the Federal Housing Administrator, the court discusses the fact that pecuniary loss was not an element to such offense, holding at page 463:

"The appellants question the sufficiency of the indictment on the theory that there can be no violation of 18 U. S. C. A., section 80 without pecuniary loss to the government. Before the amendment of 1934 the scope of the statute was, indeed, so limited. *United States v. Cohn*, 270 U. S. 339, 46 S. Ct. 251, 70 L. Ed. 616; *U. S. ex rel. Starr v. Mulligan*, 2 Cir. 59 F. 2d 200. But by the amendment just mentioned the statute was extended to cover the willful making of any false or fraudulent statements or representations 'in any matter within the jurisdiction of any department or agency of the United States.'

In this respect the element of pecuniary loss to the government is no longer an essential ingredient of the crime . . .” (Emphasis ours.)

Said case is cited with approval in the following cases:

United States v. Goldsmith, 108 F. 2d 917, 918;

United States v. Rohleder, 157 F. 2d 126, 129.

It is respectfully submitted that since pecuniary loss to the Government is not an element of the offenses charged, the Suspension Act (Section 3287) is inapplicable herein.

The point of law hereinbefore presented has never reached the direct attention of this Honorable Court, although the same has been discussed in the case of *Bridges v. United States*, 184 F. 2d 881, decided by this court on August 24, 1950. In said action, the appellant was on bond pending appeal. The District Court revoked its previous order granting bail pending appeal and the question presented was the sufficiency of the ground for such revocation. This Honorable Court, through Judge Healy, examined the record to ascertain if there was reasonable ground of appeal, including the effect of the Suspension Act, and held at page 883:

“Unless some other provision of law provides the contrary the indictment here is barred by this limitation, it having been found and returned some three years and seven months after the commission of the most recent of the alleged offenses.

In *Marzani v. United States*, 1948, 83 U. S. App. D. C. 78, 168 F. 2d 133, the Court of Appeals of the District of Columbia considered the statutory provisions which the government claims suspended the running of the three-year limitation as against the

offenses for which Bridges was indicted. The case before that court involved a charge that the government had been defrauded by false swearing by Marzani, a civil service employee, that he had never been a member of the Communist Party. The charge appears closely analogous to those found in the present indictment. The court held the suspension provision inapplicable and reversed the conviction on nine counts on the ground that the prosecution was barred by the ordinary three-year limitation. Certiorari was granted by the Supreme Court and the judgment affirmed by an equally divided court. 335 U. S. 895, 69 S. Ct. 299, 93 L. Ed. 431. In *United States v. Gottfried*, 1948, 165 F. 2d 360, the Second Circuit reached what appears to be a contrary conclusion in considering an indictment charging Gottfried with making a false and fraudulent statement in writing in a matter affecting the administration of the Office of Price Administration. The indictment had been found more than three years after the commission of the crime, but the court thought that the running of the statute was suspended by the act extending the limitation until three years after hostilities had ended in cases involving defrauding or attempts to defraud the United States or any agency thereof. The Supreme Court denied certiorari, 333 U. S. 860, 68 S. Ct. 738, 92 L. Ed. 1139.

The effect of the suspension acts or the force of earlier decisions relied on or distinguished in the Marzani and Gottfried cases need not here be considered, nor do we now express, or even entertain, any opinion as to which court was right.

Enough to say that in the condition of the decisions a seriously debatable question is presented for determination by this court and probably by the Supreme Court.” (Emphasis ours.)

This decision was prior to the case of *United States v. Obermeier*, and therefore, does not consider such case and the effect of its ruling upon the *Gottfried* case and its adherence to the rule of the *Marzani* case.

It is respectfully submitted that this Honorable Court has not heretofore construed the applicability of the Suspension Act to the facts herein stated, and that the law pertaining to such matters, excludes the offenses contained in Counts Two (2) and Four (4) of the Indictment from such Act.

(b) That if the Suspension Act Was Applicable, the Offenses Charged in Counts Two (2) and Four (4) of the Indictment Would Still Be Barred by the Statute of Limitations.

If it should be held by this Honorable Court that the Suspension Act was applicable to the offenses charged in Counts Two (2) and Four (4) of the Indictment, it is respectfully submitted that under the terminology of Section 3287, the effect of such Section no longer stayed Section 3282, which barred the prosecution of the offenses herein charged by reason of the elapse of three years.

As alleged in Count Two (2), the facts therein stated occurred on February 6, 1947, and as alleged in Count Four (4), the facts therein stated occurred on January 27, 1947. Section 3287 suspended the Statute of Limitations "*until three years after the termination of hostilities as proclaimed by the President . . .*" (Emphasis ours.) The President, in his proclamation, 2714 (hereinbefore cited), declared that the hostilities had terminated and ceased "*effective twelve o'clock noon, December 31, 1946.*" (Emphasis ours.) Thus, computing the three-year period

subsequent thereto, prosecutions were suspended until December 31, 1949, and thereafter, the Government had said three-year period terminating on the 31st day of December, 1949, in which to commence prosecution.

Counts Two (2) and Four (4) having occurred subsequent to the date of the termination of hostilities, were therefore not effected by such statute nor was the Government required to prosecute them within the three-year period after the termination of hostilities, but it is respectfully submitted that they were controlled by Section 3282, which allowed the Government a three-year period in which to commence prosecution. Thus, on Count Two (2), prosecution was required by law to be commenced prior to February 6, 1950, and on Count Four (4), prior to January 27, 1950. The Indictment herein was found and filed on June 28, 1950.

General principles of law and the decisions of our Supreme Court clearly indicate that it was the intention of the Legislature to make the Statute of Limitations commence after the conclusion of the period set forth in Section 3287. The wording of the section and the interpretation of like statutes, in prior wars, indicate that as a matter of law, the effect of the suspension of the Statute of Limitations, causes the exclusion from the computation of the period therein set forth, of the period during which the Statute was suspended.

The general principle is set forth in 22 C. J. S. 361; Criminal Law, Section 228, as follows:

“ . . . At any rate, a criminal prosecution is barred where, exclusive of any time when the opera-

tion of the statute was suspended, the statutory period has elapsed before the prosecution was commenced.”

This principle was applied during the suspension of the statute caused by the Revolutionary War.

Ogden v. Blackledge, 2 Cranch 272;

Hopkirk v. Bell, 3 Cranch 354.

A like rule was followed during the Civil War, wherein as to each respective state, denying Federal Authority, the period was excluded between the denial of such authority and the proclamation of the President, as to the restoration of such Federal Authority.

United States v. Wiley, 11 Wall. 508;

Caperton v. Boyer, 11 Wall. 216;

Hiatt v. Brown, 15 Wall. 177;

Adger v. Alaton, 15 Wall. 555;

Holdene v. Sumper, 15 Wall. 600;

Batesville Institute v. Hauffman, 18 Wall. 131;

Ross v. Jones, 22 Wall. 576.

It is respectfully submitted that if any of the offenses in the Indictment had been committed prior to the 31st day of December, 1946, under the Suspension Act, the Government would have had three years after said date in which to commence its prosecution; but as to offenses alleged to have been committed subsequent to said 31st day of December, 1946, as is true of Counts Two (2) and Four (4) of the Indictment herein, the offenses are governed by and are now barred by the provisions of the Statute of Limitations to wit, Section 3282, Title 18, United States Code—Crimes and Criminal Procedure.

II.

Having Plead Nolo Contendere, the Appellant May, Upon Appeal, Contend That the Counts to Which He Made Such Plea, Do Not State a Public Offense by Reason of the Fact That They Are Barred by the Statute of Limitations.

(a) That Pleading Either the Occurrence Within the Statute of Limitations or Elements That Extend the Statute of Limitations Is Jurisdictional to a Criminal Charge.

Counts Two (2) and Four (4) of the Indictment, state that on a specific date, the acts complained of occurred, which said dates are both more than three years prior to the founding or filing of the Indictment. No acts are alleged in either Count, which factually, would extend the Statute of Limitation such as the allegation of flight or absence from the jurisdiction. Under such circumstances, it is respectfully contended by the Appellant, that neither Count states a public offense. Although the same is of persuasive authority, the rule contended for by Appellant is emphatically stated by the Supreme Court of the State of California, in the case of *People v. McGee (John)*, 1 Cal. 2d 611, at page 613, as follows:

“In our view, the more desirable rule is that the statute is jurisdictional, and that an indictment or information which shows on its face that the prosecution is barred by limitations fails to state a public offense. The point may therefore be raised at any time, before or after judgment.

This is, of course, a rule essentially different from that governing civil actions, and it results from the different character of the statute in the two kinds of proceedings. In civil actions the statute is a privilege which may be waived by the party. In criminal

cases, the state, through its legislature, has declared that it will not prosecute crimes after the period has run, and hence has limited the power of the courts to proceed in the matter. (See *People v. Hoffman, supra*; *State v. Bilboa*, 38 Idaho 92 (213 Pac. 1025, 222 Pac. 785).) It follows that where the pleading of the state shows that the period of the statute of limitations has run, and nothing is alleged to take the case out of the statute, for example, that the defendant has been absent from the state, the power to proceed in the case is gone.”

Subsequently, the Appellate Court of the State of California summarized the rule in the case of *In re McGee (Edward)*, 29 Cal. App. 2d 648, at page 649:

“It is settled law in California that the statute of limitations in criminal actions is jurisdictional, and that an indictment or information which shows on its face that the prosecution is barred by limitations, fails to state a public offense. The point may therefore be raised at any time, before or after judgment. (*People v. McGee*, 1 Cal. 2d 611 (36 Pac. (2d) 378).)”

Whereas, the Federal cases have not been as exact in their terminology, it is respectfully submitted that they set forth and follow the same rule.

In the case of *Bold v. United States*, 265 Fed. 581, decided in this Honorable Circuit on May 3, 1920, this Honorable Court held at page 583:

“It is further urged that the evidence of Morris did not fix the date of the purported declarations of the defendant in harmony with that charged in the indictment. But we think the record clearly refutes this claim. *Moreover, the precise date alleged is not*

material, so long as it is shown that the offense was committed before the finding of the indictment and within the period of the statute of limitations—conditions which were fully met here. United States v. Fracis (D. C.), 144 Fed. 520; Hume v. United States, 118 Fed. 689, 696, 55 C. C. A. 407.” (Emphasis ours.)

In the case of *Weatherby v. United States*, 150 F. 2d 465, decided in the Tenth Circuit on June 28, 1945, the court held at page 467:

“It sufficiently appears that the unlawful use of the mails was within the statutory period of limitations. Where time is not an essential ingredient of the offense, and the indictment charges facts showing the offense was committed within the statutory period of limitations, a defect in the allegation of time is one of form only.”

In support of the latter statement of law, said court cites the following authorities:

Thompson v. United States, 3 Cir., 283 Fed. 895, 898;

United States v. McKinley, C. C. Ore., 127 Fed. 168, 170;

United States v. Gaag, D. C. Mont., 237 Fed. 728, 730, 731;

United States v. Howard, D. C. Tenn., 131 Fed. 325, 335.

Such rule is followed in the recent case of *United States v. Parrino*, 180 F. 2d 613, decided by the Second Circuit on March 7, 1950, wherein the court held at page 615:

“It follows that, if three years pass after a kidnapping, an indictment is barred if the victim has been

released ‘unharméd,’ within that period . . . Therefore, unless the three year statute was tolled by Parrino’s fight, the conviction must be reversed and the case remanded for a new trial. The Third Circuit in *United States v. Parker* has read the statute as we do.”

In the recent case of *United States v. Obermeier*, 186 F. 2d 243 (hereinbefore cited at length), the prosecution and sentencing upon the charge of making false statements in a naturalization proceedings, was reversed since the Indictment was brought more than three years after the date alleged in the Counts challenged, the court indicating that the statute involved Title 18, United States Code—Crimes and Criminal Procedure, Section 3282, expressly provides that

“no person shall be *prosecuted*, tried or *punished* for any offense, not capital, *unless the indictment is found . . . within three years next after such offense shall have been committed.*” (Emphasis ours.)

It is respectfully submitted that Counts Two (2) and Four (4) of the Indictment herein did not state public offenses in that it affirmatively appears in the wording of said Counts that the alleged Act complained of, was not committed within the period allowed by statute for the prosecution of criminal offenses, which is one of the matters that is jurisdictional to the court and necessary in order that the crime charged, constitutes a public offense.

(b) That After a Plea of Nolo Contendere, the Appellant May Appeal Upon the Ground That the Indictment or Counts Thereof to Which He Pleaded, Do Not Constitute a Public Offense.

As indicated in the statement of facts herein contained, the Appellant first presented the question of the Statute of Limitations to the trial court. The trial court denied his Motion to Quash and Dismiss upon said ground.

This is factually similar to the procedure followed by the defendant in the case of *United States v. Zullo*, 151 F. 2d 560, 561:

“The appellant moved for a dismissal of the second count on the ground that an offer to bribe a juror does not come within the language of Section 237. The motion was denied. Thereafter the appellant pleaded guilty to all three counts of the indictment and was sentenced thereon. This appeal is from the judgment rendered on the second count. The method here followed of raising the particular question brings the matter properly before us. Obviously the appellant, after the District Court’s decision on the motion, had to plead guilty to the second count of the indictment or stand trial.”

Herein, when the Appellant was faced with the alternative of pleading or standing trial, he elected to plead *nolo contendere* to said Counts Two (2) and Four (4). This plea was accepted by the trial court.

In the case of *Oesting v. United States*, 234 Fed. 304, decided in the Ninth Circuit on July 24, 1916, the de-

fendant plead guilty and thereafter appealed. This Honorable Court held at page 306:

“The defendant in error contends that the plaintiff in error, having pleaded guilty to the indictment and having presented no objection to the indictment in the court below, cannot be heard to object to the same in this court. Many authorities are cited for and against the contention. We may accept the rule to be this: First, that after a plea of guilty the only objection that can be made to the indictment in the court of first instance is that it ‘fails to describe the various acts intended to be proved with that reasonable certainty which the law requires to constitute a valid indictment’ (United States v. Bayaud (C. C.), 16 Fed. 376); and, second, that by the defendant’s failure to demur to an indictment, or to enter a motion to quash, or a motion in arrest of judgment after verdict, he waives his right to object in an appellate court to any matter which goes to the form in which the offense is stated, but he does not waive the right to raise the objection that the indictment is lacking in some essential element to constitute the offense which is charged (Hardesty v. United States, 168 Fed. 25, 93 C. C. A. 417; Dunbar v. United States, 156 U. S. 185, 15 Sup. Ct. 325, 39 L. Ed. 390; Holmgren v. United States, 217 U. S. 509, 30 Sup. Ct. 588, 54 L. Ed. 861, 19 Ann. Cas. 778; Harris v. United States, 227 U. S. 340, 33 Sup. Ct. 289, 57 L. Ed. 534).”

In the case of *Berg v. United States*, 176 F. 2d 122, also decided in the Ninth Circuit, the original decision be-

ing filed on June 15, 1949, the defendant plead guilty to several counts of an indictment. This Honorable Court, in discussing a plea of guilty, held at page 125:

“A plea of guilty means guilty as charged in the indictment. If the indictment states no basis for jurisdiction, such a plea will not create a sufficient charge. However, by a plea of guilty, all averments of fact are admitted, all defects not jurisdictional are cured, all defenses are waived and the prosecution is relieved from the duty of proving any facts.”

In its notes to such decision, this Honorable Court cites numerous decisions which in general, hold that a plea of guilty waives defects in the forms of allegations not jurisdictional, but does not waive the contention that the Indictment does not charge a public offense.

Although all cases hereinbefore cited were predicated upon a plea of guilty, the case of *United States v. Bradford*, 160 F. 2d 729, decided by the Circuit Court of Appeals of the Second Circuit on March 18, 1947, wherein a Writ of Certiorari was denied by the Supreme Court on May 19, 1947, applies the same rules to a plea of *nolo contendere*. In said case, the court holds at page 730:

“Defendant pleaded *nolo contendere* to an information charging him with using preference ratings established under section 301 of the Second War Powers Act, 50 U. S. C. A. Appendix, section 633, to secure quantities of electrical equipment greater than the ratings called for. He now appeals from a

sentence imposed pursuant to his plea. *His contention, that the information fails to charge an offense, survives his plea.* United States v. Ury, 2 Cir., 106 F. 2d 28, 124 A. L. R. 569; United States v. Max, 3 Cir., 156 F. 2d 13.” (Emphasis ours.)

The Supreme Court of the United States, in the case of *United Brotherhood v. United States*, 330 U. S. 395, wherein the Appellant, a corporation, had plead guilty to an indictment charging the criminal restraint of trade, held at page 412, as follows:

“Ordinarily a plea of *nolo contendere* leaves open for review only the sufficiency of an indictment.”

In supporting its said ruling, said court cites in the footnotes of said case, the following law and authorities:

“*Nolo contendere* ‘is an admission of guilt for the purposes of the case.’

Hudson v. United States, 272 U. S. 451, 455, 71 L. ed. 347, 349, 47 S. Ct. 127;

United States v. Norris, 281 U. S. 619, 622, 74 L. ed. 1076, 1077, 50 S. Ct. 424.

And like pleas of guilty may be reviewed to determine whether a crime is stated by the indictment.

Hocking Valley R. Co. v. United States (C. C. A. 6th), 210 F. 735, 738;

Tucker v. United States (C. C. A. 7th), 196 F. 260, 262, 41 L. R. A. (N. S.) 70.”

It is respectfully submitted that after a plea of *nolo contendere*, the Appellant was entitled to appeal upon the ground that the counts of the Indictment to which he plead do not constitute a public offense.

III.

That Count Four (4) of the Indictment Does Not State a Public Offense in That It Is Not Indicated Therein That the Application Therein Described, Was for Credit or the Amount Thereof.

The code section applicable to the offenses charged is Section 1010 of Title 18, United States Code—Crimes and Criminal Procedure. This section reads as follows:

“Federal Housing Administration transactions. Whoever, for the purpose of obtaining any loan or advance of credit from any person, partnership, association, or corporation with the intent that such loan or advance of credit shall be offered to or accepted by the Federal Housing Administration for insurance, or for the purpose of obtaining any extension or renewal of any loan, advance of credit, or mortgage insured by such Administration, or the acceptance, release, or substitution of any security on such a loan, advance of credit, or for the purpose of influencing in any way the action of such Administration, makes, passes, utters, or publishes any statement, knowing the same to be false, or alters, forges, or counterfeits any instrument, paper, or document, or utters, publishes, or passes as true any instrument, paper or document, knowing it to have been altered, forged, or counterfeited, or willfully overvalues any security, asset, or income, shall be fined not more than \$5,000 or imprisoned not more than two years, or both.”

Each of Counts Two (2) and Four (4), after alleging the foregoing purpose in the wording of the statute, thereupon proceeds to further allege that the defendants “did cause to be presented to the Bank of America Na-

tional Trust and Savings Association, a written Federal Housing Administration, Title I credit application for a property improvement loan, containing the signatures of” the respective applicants named in each count, Count Two (2) proceeding to allege that “said application *applying for and requesting credit in the amount of \$2,498.00, and said application* stating and representing that said credit was to be used for the purchase of materials for additions and improvements to a dwelling house.” Each count thereafter alleges that the defendants knew that the said loan was not for such purpose, but was to be used to purchase materials for the construction of a new dwelling house. Count Four (4) does not contain that part of such allegation that is emphasized, and does not contain the element that such credit application applied for or requested credit in any specified sum of money.

It therefore appears from Count Four (4) that the application therein presented did not apply for or request any credit or the amount of credit requested.

It is respectfully submitted that in order that the application should be one of those germane to the code section, the same factually must seek to obtain by applying for and requesting credit in some definite sum, and that the absence of such application and request, excludes the instrument from the operation of the statute. The presentation to the banking institution, of a signed application form, containing no request for credit is not an act prohibited by the statute, since the same could not influence the Federal Housing Administration in the conduct of its functions. In the absence of such application or request for a definite sum of money, no action could be taken by

the Federal Housing Administration thereon. The Appellant sought to elicit information that would be curative of this omission by his Motion for Bill of Particulars [See Bill of Particulars, item 25, Tr. of Rec. p. 13; item 66, Tr. of Rec. p. 24; item 105, Tr. of Rec. p. 31]. The District Court refused Appellant's request for such particulars [Tr. of Rec. p. 39].

It is respectfully submitted that said allegation is a matter of substance and that its absence makes said count fatally defective.

In the case of *Oesting v. United States*, 234 Fed. 304, hereinbefore cited at length, this Honorable Court ruled that the objection that the Indictment "fails to describe the various acts intended to be proved with the reasonable certainty which the law requires to constitute a valid indictment," survives the plea of guilty. Such rule has been adhered to by subsequent decisions.

Appellant respectfully invites the court's attention to the case of *Michener v. United States*, 170 F. 2d 975, wherein the law contended for is stated at page 975, as follows:

"If the indictment or information fails to allege any matter of substance, that is, any material ingredient of the crime, it is fatally defective. If, however, it fails to advise the defendant with sufficient particularity of matters necessary to enable him to prepare his defense and to safeguard him from further prosecution for the same act, such details may be supplied by a bill of particulars without affecting the integrity of the prosecution. In such

case, the duty devolves upon a defendant to make seasonable and appropriate application for the information desired.' Myers v. United States, 8 Cir., 15 F. 2d 977, 985."

It is respectfully submitted that the omission of the allegation that the application described in Count Four (4) of the Indictment was for the purpose of "applying for and requesting credit" in a specific sum of money, is a matter of substance and a material ingredient of the offense alleged in said Section 1010 and that by reason thereof, such count is fatally defective.

Conclusion.

It is respectfully submitted that the plea of *nolo contendere* of Appellant to Counts Two (2) and Four (4) of the Indictment is ineffective, since said counts are both upon the facts therein stated, barred by the Statute of Limitations, and Count Four (4) fails to state essential matters of substance. It is further respectfully submitted that for such reasons, the Judgment and Commitment [Tr. of Rec. p. 40] of the trial court, should be reversed by this Honorable Court.

Respectfully submitted,

EUGENE L. WOLVER,

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No. 13023.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

AL FREED, FRED JOHNSEN and RALPH KUSHNER,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

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FILED

DEC 29 1951

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No. 13023.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

AL FREED, FRED JOHNSEN and RALPH KUSHNER,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

Appellant, Fred Johnsen, was found guilty after trial by the Court, on six counts of an indictment. He was charged in each count with participating in the known presentation of Federal Housing Administration Applications. Three of the presentations took place more than three years prior to the filing of the indictment.

Statement of Facts.

The appellant, Fred Johnsen, was one of the defendants named in the indictment, found and filed in the above entitled cause on the 28th day of June, 1950. The appellant thereafter challenged the legal sufficiency of certain counts to the indictment, including Counts 2, 4 and 39 by Motion to Dismiss and Quash "upon the ground that each and

all of said counts are barred by the Statute of Limitations and particularly Title 18, United States Code—Crimes and Criminal Procedure, Section 3282.” [Tr. of Rec. p. 8.]

Thereafter a Bill and a Motion for a Bill of Particulars was filed in an effort to obtain information as to the commission of the alleged acts.

Both motions were heard and denied by the Court on September 25, 1950 [Tr. of Rec. pp. 30 and 40], on the ground that the acts complained of were a “fraud” against the United States. [Tr. of Rec. pp. 48-51.]

On October 30, 1950, appellant plead not guilty to all counts contained in the indictment. [Tr. of Rec. pp. 40-42.]

Thereafter appellant Fred Johnsen was found guilty after trial by the Court on Counts 2, 4, 19, 23, 30 and 39.

On the 4th day of June, 1951, the Court entered its Judgment and Commitment adjudging that appellant had been convicted upon his plea of not guilty, and a finding of guilty as to each of Counts 2, 4, 19, 23, 30, and 39, of the offenses of (Count 2), that on or about Feb. 6, 1947, in Los Angeles County, California, defendant did prepare and present a credit application to the Bank of America N. T. & S. A., with intent such loan be insured by the Federal Housing Administration, representing said credit was for the purchase of materials for additions to a dwelling house, defendant then knowing said statement was false in that the loan was to be used for

purchase of materials for construction of a new dwelling house; (Counts 4, 19, 23, 30 and 39 charge violations similar to Count 2), as charged in said Indictment.

The Court thereupon ordered the defendant committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of six months in an institution of the jail type on Count 2, and pay unto the United States of America a fine of \$1,000.00 on Count 4, a fine of \$1,000.00 on Count 19, a fine of \$1,000.00 on Count 23, a fine of \$1,000.00 on Count 30, and a fine of \$1,000.00 on Count 39; said sentences on Counts 23, 30 and 39 to run concurrently with sentences on Counts 4 and 19, so that the total fine to be paid is \$2,000.00, and the Clerk is authorized to accept \$2,000.00 in full satisfaction of said fines; and defendant shall stand committed to an institution of the jail type until said fines are paid or he is discharged therefrom by due process of law.

Issues.

It is respectfully submitted that the following issues are presented:

(1) Are Counts 2, 6 and 39 of the Indictment barred by the Statute of Limitations and particularly Title 18 of the United States Code—Crimes and Criminal Procedure, Section 3282?

(2) Does Count 4 state a public offense in that it is not indicated therein that the application therein described was for credit or the amount thereof?

STATEMENT OF LAW.

I.

That Counts Two (2), Four (4) and Thirty-nine (39) of the Indictment Are Barred by the Statute of Limitations and Particularly Title 18 of the United States Code—Crimes and Criminal Procedure, Section 3282.

Appellant Fred Johnsen incorporates herein by reference the argument on this point of the appellant Al Freed and contained on pages 4 to 22, inclusive, of appellant Al Freed's Opening Brief.

We wish, however, to call the Court's attention to the unreported case: *United States of America, Appellant, v. Louise Virginia Smith*, on appeal from the United States District Court for the Western District of Texas.

In the *Smith* case, on October 2, 1950, an indictment of two counts was filed in the District Court for the Western District of Texas charging the appellee Smith with having, on or about July 1, 1947, violated Section 29 of the Criminal Code (18 U. S. C. (1946 Ed.), 73), now 18 U. S. C. 495. Count 1 charged that she falsely made and forged the name of the payee on the back of a check drawn on the Treasurer of the United States for the purpose of obtaining the amount of the check from the Government. Count 2 charged that she uttered the check as true, knowing the indorsement to be forged, with intent to defraud the United States.

The appellee moved to dismiss the indictment on the grounds that since it showed on its face that the offenses

charged had been committed more than three years prior to the return of the indictment it was barred by limitations, and that these offenses did not come within the provisions of 18 U. S. C. 3287, which provides for the suspension of limitations in certain classes of cases while the United States is at war. On October 16, 1950, the District Court granted the motion to dismiss, the order stating simply that the dismissal was "on the ground that more than three years had elapsed from the time of the commission of the offense as alleged in the indictment and the return of the indictment."

On November 9, 1950, the Government filed a petition for rehearing pointing out that the offenses charged in the indictment involved defrauding the United States; that under the Wartime Suspension of Limitations Act of 1942, as amended (18 U. S. C. (1946 Ed.) 590a), the running of the statute of limitations applicable to such offenses was suspended "until three years after the termination of hostilities in World War II"; that hostilities in World War II were declared terminated as of December 31, 1946, by Presidential Proclamation 2714 of that date; that accordingly, the three-year statute of limitations applicable to the offenses charged did not commence to run until three years after December 31, 1946, *i. e.*, until December 31, 1949; and that, consequently, the indictment which was returned on October 2, 1950, was not barred by the Statute of Limitations.

The District Court denied the petition for rehearing, holding that the indictment had been properly dismissed

on the ground that it had been filed too late, *i. e.*, more than three years after the date of the commission of the alleged offenses. In so holding, the District Court stated:

“The Court is of the opinion that the Suspension Act, 18 U. S. C. 590(a), being the Act of August 24, 1942, as amended in 1944, applies only to offenses committed during the time prior to the termination of hostilities. Hostilities were proclaimed terminated as of December 31, 1946. The alleged offense is charged to have occurred July 1, 1947, and the three-year statute of limitations barred prosecution of this offense three years thereafter. * * * The purpose of the amendment (18 U. S. C. 590(a)) was not to let crimes pass unpunished which had been committed in the hurly burly of war * * * United States v. Gottlieb, 165 Fed. 2d 360, page 368.”

Thereafter, and on February 1, 1951, the United States filed its notice of appeal to the Supreme Court of the United States and this Court noted probable jurisdiction on October 8, 1951.

II.

That Count II of the Indictment Does Not State a Public Offense in That It Is Not Indicated Therein That the Application Therein Described Was for Credit on the Amount Thereof.

Appellant Fred Johnsen incorporate herein by reference the argument on this point of the appellant Al Freed as contained on page 31 to the word “Conclusion” on page 34.

Conclusion.

It is submitted that Counts Two (2), Four (4), and Thirty-nine (39) are all, by the facts stated therein, barred by the Statute of Limitations, and Count Four (4) fails to state a cause of action.

It is further submitted that for such reasons, the judgment and commitment of the Trial Court as to Counts Two (2), Four (4) and Thirty-nine (39) should be reversed by this Honorable Court.

Respectfully submitted,

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By BURKE MATHES,

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No. 13023.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

AL FREED,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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No. 13023.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

AL FREED,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

Jurisdictional Statement.

Appellant was indicted under Section 1731(a) of Title 12 of the United States Code, and Section 88 (1946 Edition) of Title 18 of the United States Code, on June 28, 1950 [R.¹ 6]. The District Court had jurisdiction of the cause under Section 3231 of Title 18 of the United States Code. The offenses charged were committed in Los Angeles, Riverside and San Bernardino Counties, within the Central Division of the Southern District of California.² Judgment was entered on June 4, 1951 [R. 42-44]. Notice of Appeal was filed on June 14, 1951. This Court had jurisdiction under Section 1291 of Title 28 of the United States Code.

¹References preceded by the letter "R" are to the printed "Transcript of Record"; those by the letters "AB" to the Appellant's Opening Brief.

²The Indictment so charged [R. 3-6]. No attack is made on the grounds of lack of venue.

Statement of Case.

On June 28, 1950, the Federal Grand Jury at Los Angeles returned an Indictment against appellant and others in forty-one counts, which was filed that day in the United States District Court for the Southern District of California, Central Division [R. 3-6]. The first count of the Indictment charged the appellant and others with conspiring and agreeing together to make, pass, utter and publish, and cause to be made, passed, uttered and published, false statements, for the purpose of obtaining loans and advances of credit from the Bank of America National Trust and Savings Association, with the intent that the loans and advances of credit would be offered to and accepted by the Federal Housing Administration for insurance, in violation of Section 1731(a) of Title 12 of the United States Code Supplement. The first count also charged the appellant and others with conspiracy to defraud the United States by conspiring to obstruct the functioning of the Federal Housing Administration by causing the Federal Housing Administration to insure loans made to applicants whose applications made under the provisions of Title I of the National Housing Act of 1934, stated that the purpose of the loan was for financing the improvement of existing dwelling houses, in cases where the unrevealed purpose of securing the loans was for the financing of the construction of new dwelling houses, contrary to the provisions of Title I of the National Housing Act of 1934.

The remaining forty counts of the indictment charged the appellant and others with making, passing, uttering and publishing, and cause the making, passing, uttering and publishing of false Federal Housing Administration

Title I Credit Applications, for the purpose of causing the Bank of America National Trust and Savings Association to extend loans and advances of credit to the applicants and with the intent that the Bank of America should offer these loans and advances of credit to the Federal Housing Administration for insurance and with the intent that the Federal Housing Administration accept the loans and advances of credit for insurance. Each of these forty counts involved a single and separate falsified Title I Credit Application.

On August 7, 1950, a Motion to Dismiss and Quash the Indictment herein was filed in the District Court on behalf of the appellant and others [R. 8]. On August 28, 1950, a Motion for Bill of Particulars was filed in the District Court on behalf of the appellant [R. 9-38]. On September 25, 1950, after a hearing on the above motions by the District Court, a Minute Order was entered by the Court denying the motions of appellant [R. 38-40].

On October 30, 1950, the appellant pleaded not guilty to all counts of the Indictment [R. 40-42]. On April 24, 1951, the appellant changed his plea of not guilty to that of *nolo contendere* as to Counts Two and Four of the Indictment.

On June 4, 1951, appellant was sentenced to imprisonment of six months on Count Two and to pay a fine of \$1,000 on Count Four and to stand committed until paid or until he is discharged therefrom by due process of law [R. 43]. Notice of Appeal was filed on June 14, 1951 [R. 44].

Statutes and Regulations Involved.

(a) Penal Statute.

Section 1731(a) of Title 12 of the United States Code Supplement provided:³

Whoever, for the purpose of obtaining any loan or advance of credit from any person, partnership, association, or corporation with the intent that such loan or advance of credit shall be offered to or accepted by the Federal Housing Administration for insurance, or for the purpose of obtaining any extension or renewal of any loan, advance of credit, or mortgage insured by the said Administration, or the acceptance, release, or substitution of any security on such a loan, advance of credit, or for the purpose of influencing in any way the action of the said Administration under this chapter, makes, passes, utters, or publishes, or causes to be made, passed, uttered, or published any statement, knowing the same to be false, or alters, forges, or counterfeits, or causes or procures to be altered, forged, or counterfeited, any instrument, paper, or document, or utters, publishes, or passes as true, or causes to be uttered, published, or passed as true, any instrument, paper, or document, knowing it to have been altered, forged, or counterfeited, or willfully overvalues any security, asset, or income, shall be punished by a fine of not more than \$3,000 or by imprisonment for not more than two years, or both.

³This text now appears as Section 1010 of Title 18 of the United States Code.

(b) Statute of Limitations.

Section 3282 of Title 18 of the United States Code provides :

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within three years next after such offense shall have been committed.

(c) Wartime Suspension of Limitation Statutes.

Section 3287 of Title 18 of the United States Code provides :

When the United States is at war the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not, or (2) committed in connection with the acquisition, care, handling, custody, control or disposition of any real or personal property of the United States, or (3) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancellation, or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the war, or with any disposition of termination inventory by any war contractor or Government agency, shall be suspended until three years after the termination of hostilities as proclaimed by the President or by a concurrent resolution of Congress.

Section 590a of Title 18 of the United States Code provides:

The running of any existing statute of limitations applicable to any offense against the laws of the United States (1)involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner, or (2) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancellation or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the present war, or with any disposition of termination inventory by any war contractor or Government agency, or (3) committed in connection with the care and handling and disposal of property under sections 1611-1646 of Appendix to Title 50, shall be suspended until three years after the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress. This section shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but it shall not apply to acts, offenses, or transactions which are already barred by provisions of existing law.

(d) Proclamation of Cessation of Hostilities.

Proclamation 2714, Federal Register Volume 12, No. 1, Page 1:

With God's help this nation and our allies, through sacrifice and devotion, courage and perseverance, wrung final and unconditional surrender from our enemies. Thereafter, we, together with the other United Nations, set about building a

world in which justice shall replace force. With spirit, through faith, with a determination that there shall be no more wars of aggression calculated to enslave the peoples of the world and destroy their civilization, and with the guidance of Almighty Providence great gains have been made in translating military victory into permanent peace. Although a state of war still exists, it is at this time possible to declare, and I find it to be in the public interest to declare, that hostilities have terminated.

Now, Therefore, I, Harry S. Truman, President of the United States of America, do hereby proclaim the cessation of hostilities of World War II, effective twelve o'clock noon, December 31, 1946.

(e) Governing Regulations.

Title 24, Housing Credit, Ch. V—Federal Housing Administration, Subchapter A—Property Improvement Loans, Part 501—Class 1 and Class 2 Property Improvement Loans (Federal Register, Volume 9, Page 7253).

Section 501.2(j).

“Class 1 (a) loan” means a loan, other than a loan defined in paragraph (k) of this section as a “Class 1 (b) loan” which is for the purpose of financing the repair, alteration, or improvement of an existing structure or of the real property in connection therewith, exclusive of the building of new structures. The term “existing structure”

means a completed building that has or had a distinctive functional use.

Section 501.2 (k)

“Class 1 (b) loan” means a loan which is (1) made for the purpose of financing the alteration, repair, improvement, or conversion of an existing structure located in an area or locality in which the President shall find that an acute shortage of housing exists or impends, which would impede national war activities and (2) is made for the purpose of providing additional living accommodations to which the borrower shall establish in a manner and upon forms prescribed by the Commissioner that occupancy priority will be given to war workers.

Summary of Argument.

The argument of the appellee is divided into three parts. (1) The first part is in answer to the contention of appellant that Section 3287 of Title 18 of the United States Code is inapplicable to the statute under which the appellant was indicted, namely, Section 1731(a) of Title 12 of the United States Code. (2) The second part discusses the contention of the appellant that assuming Section 3287 to be applicable to the offense charged, the language of Section 3287 does not save offenses committed after December 31, 1946, and prior to June 28, 1947, for prosecution on or after June 28, 1950. (3) The third part deals with appellant's attack on the sufficiency of Count Four of the Indictment.

ARGUMENT.

I.

Section 3287 of Title 18 of the United States Code, Known as the Suspension Act, or Statute, Is Applicable to Section 1731(a) of Title 12 of the United States Code.

1. One argument advanced by the appellant is that Section 1731(a) of Title 12, U. S. C., is not definitive of an offense “involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not.”⁴ Considerable reliance is placed by appellant on the case of *Marzani v. United States*, 168 F. 2d 133. The Government finds nothing in the *Marzani* opinion to impeach the ruling of the District Court on the questions again raised by the appellant here.

The Court in the *Marzani* decision concluded that in order for the Suspension Act to apply, defrauding the United States in a pecuniary way must be an essential ingredient.⁵ Now, the appellant appears to derive from the language of the decision the rule that a statute within the Suspension Act is one in which an accomplished pecuniary loss to the United States is an essential element to be alleged and proved (A. B. 10-12). This cannot be, for the Suspension Act requires only that the offense be one “involving fraud or attempted fraud” (emphasis added); also, an examination of every criminal statute in the United States Code under the index entitlement of

⁴Section 3287 of Title 18, U. S. C.

⁵At page 136 of the reported decision.

“fraud” reveals no statute in which *accomplished* pecuniary fraud of the United States or an agency of the United States is made an essential element of the offense. It is extremely doubtful that there has ever been a criminal statute enacted by Congress in which accomplished fraud was an element for proof. The *Marzani* decision places within the Suspension Act all offenses consisting of certain acts done by the wrongdoer *with specific intent to defraud the United States in a pecuniary sense*. The words “essential ingredient” were employed by the Court at page 136 of the decision in place of the words “specific intent,” and were meant to convey the same meaning.

In applying the rule of the *Marzani* case to Section 1731(a) of Title 12, we first observe that the offense is one requiring a specific intent. The appellant has apparently failed to recognize this most important element of the statute under which he is charged, for it will be observed that it is not included by him as a portion of the “gravamen of the offenses” (A. B. 8). Counts Two and Four of the Indictment charge the specific intent in the language of the statute, to wit: “with the intent that such loan and advance of credit should be offered to and accepted by the Federal Housing Administration for insurance.” A reading of the entire statute clearly reveals that its purpose is to discourage those who would by false representations induce the Federal Housing Administration to assume the risk of financial loss in instances where the risk would not have been taken had the truth been known to the Agency. It is difficult to conceive how the false procurement of these guarantees, making the loans possible, was not a pecuniary fraud in the most obvious sense. The intent to work a pecuniary fraud on the Federal Housing Administration is spelled out in the statute

with particularity making it an essential element to be alleged and proved. The appellant and his associates acted to place the burden of ultimate financial loss on the United States in order that they might gain financially, and this was accomplished by the appellant and others by the device of falsification of loan applications. An excellent definition of fraud, in relation to contractual situations such as we have here appears in the Civil Code of Louisiana, Article 1847. It reads as follows:

“Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage, to the one party, or to cause an inconvenience or loss to the other.”

It is apparent that the wilful falsification with which we are here concerned was executed with design to gain an unjust financial advantage and to cause a financial loss to the United States.

2. The other leading case on the interpretation of the Suspension Act is *United States v. Gottfried*, 165 F. 2d 360. This case and the *Marzani* case appear to be in opposition on their definition of the word fraud as it appears in the Suspension Act. The definition of fraud as it appears in the *Gottfried* decision, at page 136, “includes any conduct, ‘calculated to obstruct or impair its’ (the United States’) ‘efficiency and destroy the value of its operations and reports.’” There is no doubt that Section 1731(a) of Title 12 comes within this broad definition of fraud. In the *Gottfried* case the Second Circuit held that Section 80 of Title 18, U. S. C. (1946 Edition) was within the Suspension Act. The offense involved was the making of false and fraudulent statements to the Office of Price Administration in obtaining sugar ration coupons. The

Marzani decision unequivocally holds that Section 80 of Title 18, U. S. C., is *not* within the Suspension Act. There has been no ruling by the Supreme Court of the United States to resolve this split of authority. The *Marzani* decision was reviewed by the Supreme Court on the application of the defendant, who had been convicted on counts of the indictment alleging offenses within the three-year limitation, and his appeal was concerned only with those counts. There is nothing to indicate that the Supreme Court had before it the question of the application of the Suspension Act. *Marzani's* conviction was affirmed. *Gottfried* applied to the Supreme Court for certiorari and his application was denied. We might with some justification assume that the denial of the writ of certiorari in the *Gottfried* case is more indicative of the attitude of the Supreme Court in favor of the broad application of the Suspension Act, than is the affirmance of the *Marzani* conviction by that Court.

The reported decisions uniformly follow the rule of the *Gottfried* case.

United States v. Agnew, 6 F. D. R. 566 (Eastern District of Pennsylvania);

United States v. Bridges, 86 Fed. Supp. 922;

United States v. Choy Kum, 91 Fed. Supp. 769.

In *United States v. Gould*, No. 21290-Criminal, Southern District of California, the defendant challenged the sufficiency of an indictment charging him under Section 80 of Title 18, U. S. C., with falsifying and causing the falsification of a veteran's war surplus purchase application made to the War Assets Administration. The offense was alleged to have occurred in April, 1947, and the indictment was returned in May, 1950. Judge Ben Harrison denied the

motion of defendant to quash the indictment, after argument, ruling that the Suspension Act was for application to Section 80, Title 18, U. S. C. The pecuniary aspect of fraud was entirely lacking in the *Gould* case.

This Court has already suggested a preference for the broad rule of the *Gottfried* decision in *Furrow v. Koutsky-Brennan-Vana Company*, 182 F. 2d 496, and *Danebo Lumber Company v. Koutsky-Brennan-Vana*, 182 F. 2d 489.

The appellant has cited the cases of *United States v. Mellen*, 96 F. 2d 462, and *United States v. Obermier*, 186 F. 2d 243, in support of his argument that the Suspension Act does not apply to Section 1731(a) of Title 12, U. S. C. In the *Mellen* case the question of the applicability of the Suspension Act was not an issue. In the *Obermier* case the Court devotes two paragraphs at the end of a rather lengthy decision, to discuss the applicability of Section 3287 of the Suspension Act to an indictment charging a false statement under oath in a matter relating to naturalization and citizenship. The language employed by the Court does no more than affirm what the same Court held in the *Gottfried* case, namely, that fraud must be an ingredient under the statute defining the offense in order for the statute to come within the Suspension Act. There is nothing in the *Obermier* case to suggest in the slightest that the Second Circuit is subscribing to the pecuniary fraud doctrine of the *Marzani* case. The only reference to the *Marzani* case in the *Gottfried* decision is in a footnote at the bottom of the second column of page 257 of the reported decision which reads: "See also *Marzani v. United States*, 83 U. S. 8 App. D.C. 78, 168 F. (2d) 133." In the same footnote the Court mentions that in *Gottfried v. United States* they had interpreted

Section 80 of Title 18, U. S. C., as an offense so defined as to make fraud an ingredient. We have failed to discover any basis for the appellant's assertion on page 16 of his Opening Brief that the *Obermier* case was based upon the decision of the *Marzani* case. There is nothing in the *Obermier* case to remotely suggest this. It has never been the contention of the Government that the Suspension Act embraced any statute in which fraud was not an ingredient.

3. The failure of the Courts to adopt the views expressed in the *Marzani* case is probably occasioned chiefly by the difficulty the Courts have in construing the obviously broad language of the Suspension Statute in so narrow a manner. There are other weaknesses in the decision which have probably lead to its rejection. We refer particularly to certain statements in the opinion which appear to be made with no foundation. At page 136, the Court said:

“The Supreme Court has clearly said (1) that a statute identical in pertinent part with the Suspension Act does not apply to offenses of which defrauding the United States in a pecuniary way is not an essential ingredient; * * *

No where else in the decision does the Court set out its authority for this statement, and the Government has been unable to find any Supreme Court decision stating clearly or otherwise that pecuniary fraud is an essential ingredient of those offenses under the false claims act.

In conclusion, the Government submits that the fraud which is an element in Section 1731 (a) of Title 18 U. S. C. is within the definition of fraud as expressed in either the *Marzani* or *Gottfried* cases.

II.

The Operation of Section 3287 of Title 18 of the United States Code Allows the Prosecution of Counts Two and Four of the Indictment at Any Time Up to January 1, 1953.

The argument of the Appellant is that the Suspension Act did not operate to effect any offense committed after the Presidential Proclamation. The language of the Suspension Statute to be construed is as follows:

“When the United States is at war, the running of any existing statute of limitations * * * shall be suspended until three years after the termination of hostilities as proclaimed by the President * * *”

The Presidential Proclamation terminating hostilities is set out earlier in our brief. It bears the date December 31, 1946. Three years from that date, namely, December 31, 1949, is the time that the running of the normal three-year statute of limitations again commenced. From December 31, 1949, Section 3282 of Title 18, U. S. C. was again effective. The appellant states at page 20 of his Opening Brief that “Section 3287 suspended the statute of limitations until three years after the termination of hostilities as proclaimed by the President.” This is not a correct statement of the language of the Suspension Act, for certain words were omitted; and it would appear that from this first erroneous premise the appellant has attempted to develop his argument. The correct statement is that the Suspension Statute suspended the *running* of the statute of limitations. It is the position of the

Government that the operation of the statute of limitations as to Counts Two and Four was suspended by the express language of the Suspension Act until December 31, 1949, at which time the statute again became effective and the three year statutory period again started to run and will have run out at the end of 1952. The statute of limitations was tolled by the Suspension Act, *United States v. Bridges, supra, Danebo Lumber Company v. Koutsky-Brennan-Vana Co., supra.*

Any other interpretation of the operational effect of the language of the statute leads to a strange result when applied to the original Suspension Act of World War II, (Act of August 24, 1942; 56 Stat. 747; Title 18 U. S. C. Supp. II, Section 590a.) This Suspension Act was framed in substantially the same language as the successor Suspension Acts with the exception that it operated to suspend the running of any statute of limitations until June 30, 1945. Actually, the only difference between the statutes was that the 1942 Act set out a definite date at which time the statute of limitations should again be operative, whereas the present Suspension Statute established a formula by which the lifting of the suspension may be calculated with reference to a contingent event. The Appellant's theory, when applied to the 1942 Suspension Act, would have resulted in the barring from prosecution of an offense committed on June 29, 1942, while we were at war, if the indictment were returned after June 29, 1945.

III.

Count Four of the Indictment States a Public
Offense and Is Otherwise Sufficient.

The appellant has challenged the sufficiency of Count Four of the Indictment. He bases his attack on the theory that the Count failed to state that the "Application therein described was for credit or the amount thereof" (A. B. 31).

The language employed in Count Four varies from the pattern of Count Two and the other substantive counts of the Indictment in one respect only. Count Four does not allege the precise amount of credit requested in the credit application. It does state that the application was made for credit, in the following passages:

"* * * for the purpose of obtaining a loan and an *advance of credit* * * * with the intent that such loan and *advance of credit* should be offered to and accepted by the Federal Housing Administration * * * the defendants did prepare and present * * * a written Federal Housing Administration Title I *Credit Application* * * * *said application stating and representing that said credit* * * * the defendants then knew that the *loan and credit* so applied for * * *." (Emphasis added.)

Appellant's considerable argument that Count Four fails to show that the application form contained a request for credit ignores particularly that portion of the Count which says "* * * *said application stating and representing that said credit was to be used* * * *."

Appellant states (A. B. 33) that he sought to elicit information that would be curative of the omissions, by a Motion of a Bill of Particulars. An examination of

the portion of the appellant's Bill of Particulars referring to Count Four does not bear this out. We refer to item 25 [R. 13], item 66 [R. 24], item 105 [R. 31]. There is nothing in the Bill of Particulars to indicate that appellant distinguished Count Four from the other counts of the Indictment; and there is clearly no request that the omitted amount be stated. The case of *Michener v. United States*, 170 F. 2d 975, also cited by appellant (A. B. 33), contains this language:

“‘If the indictment or information fails to allege any matter of substance, that is, any material ingredient of the crime, it is fatally defective. If, however it fails to advise the defendant with sufficient particularity of matters necessary to enable him to prepare his defense and to safeguard him from further prosecution for the same act, such details may be supplied by a bill of particulars without affecting the integrity of the prosecution. In such case, the duty devolves upon a defendant to make seasonable and appropriate application for the information desired.’ *Myers v. United States*, 8 Cir., 15 F. 2d 977, 985.”

This appellant here failed in that duty which devolves upon him to make the reasonable and appropriate application; and after pleading to Count Four, he now for the first time has challenged its sufficiency.

The modern practice of the Federal Courts, especially since the adoption of the Federal Rules of Criminal Procedure, is to consider the adequacy of Indictments on the

basis of practical as opposed to technical considerations. The Federal Rules of Criminal Procedure, Rule 7(c), provide as follows:

“(c) Nature and Contents. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.”

An inspection of Count Four reveals that it meets the requirement of this Rule. The date is designated, the place of the transaction is designated, the defendants are named, the application is sufficiently described by the above date and by naming the applicants and the location of the proposed improvements. It alleges that the appellant and others falsified the application with the requisite specific criminal intent.

These allegations sufficiently earmark and identify the offense.

It is submitted that these allegations,

- (a) Inform the Appellant of the offense with which he is charged; and
- (b) Are sufficiently certain to safeguard the accused from a second prosecution for the same act.

This Circuit, in the case of *U. S. v. Bickford*, 168 F. 2d 26 (C. C. A. 9), discussed an indictment with relation to the New Rules. In the *Bickford* case the District Court had held a perjury indictment to be insufficient because it did not directly aver that the officer administering the oath had competent authority to administer same. In reversing the District Court's holding and in declaration

of the sufficiency of the indictment, this Circuit stated as follows:

“The criminal rules were designed to simplify existing procedure and to eliminate outmoded technicalities of centuries gone by. Certainly Rule 7(c) was not intended to be less liberal than is the modern practice of the federal courts to consider the adequacy of indictments on the basis of practical as opposed to technical considerations. It has long been settled in the federal jurisdiction that an indictment is good if (1) it states facts sufficient to inform the defendant of the offense with which he is charged, and (2) if its averments be sufficiently certain to safeguard the accused from a second prosecution for the same act. *Hagner v. United States*, 285 U. S. 427, 52 S. Ct. 417, 76 L. Ed. 861; *Berger v. United States*, 295 U. S. 78, 55 S. Ct. 629, 79 L. Ed. 1314; *Hopper v. United States*, 9 Cir., 142 F. 2d 181. As observed in *Hagner v. United States*, *supra*, at page 433 of 285 U. S., at 420 of 52 S. Ct., ‘it is enough that the necessary facts appear in any form, or by fair construction can be found within the terms of the indictment.’ ”

More recently this Circuit again sustained the sufficiency of an indictment with relation to the requirements of Rule 7(c), Federal Rules of Criminal Procedure.

See:

Flynn v. U. S., 172 F. 2d 12 (C. C. A. 9).

In the *Flynn* case an indictment for perjury merely alleged that the defendant, while testifying under oath, stated in open court certain material matter which he did not believe to be true, and then described the testimony of the accused. This was held to be sufficient under Rule

7(c), even though it did not contain the additional charge that the testimony given was in fact false. The court points out that the charges are stated in terms that protect the accused from the danger of being put in double jeopardy.

As an additional illustration of a recent ruling of the courts, we refer to a recent case decided by the Circuit, namely, *U. S. v. Ochoa*, 167 F. 2d 341 (C. C. A. 9). In that case, this court held that the omission in a murder charge of the phrase "with malice aforethought", as is provided in the statutory definition of murder (18 U. S. C., Section 452), was not bad. The court pointed out that the indictment in the *Ochoa* case was modeled after form No. 1 in the Appendix to the Federal Rules of Criminal Procedure.

This Circuit has again reaffirmed a liberal interpretation in construing an indictment in the case of:

McCoy v. U. S., 169 F. 2d 776 (C. C. A. 9).

In the *McCoy* case this court sustained a challenged count of an indictment charging the presentation of false claims and for aiding and abetting the so doing, . . . a situation quite similar to that now confronting this court. It was held by this court that every particular relating to such charge need not be set out in the indictment and also it was pointed out that the indictment must be considered as a whole:

"Appellant's construction of the indictment is too narrow. In the first place every particular relating to the charge is not required to be set out in the indictment, and it is not required that every possible combination of facts, which would constitute legal acts, should be negated in it. . . . The indictment

must be considered as a whole, and the violated statute is cited in it and plainly informs the accused of the law allegedly violated.”

The case of *Eisler v. U. S.*, 170 F. 2d 273 (C. A. D. C.), at pages 280-281, further illustrates the attitude of the courts in sustaining the sufficiency of an indictment, especially since the adoption of the Federal Rules of Criminal Procedure, *i. e.*, Rule 7(c).

Conclusion.

The crime here charged is the falsification of Credit Application to induce the Government to insure certain loans. The Indictment charges an offense in which a pecuniary fraud is an ingredient; and in which fraud in the broader sense is an ingredient. The Indictment was filed in time by reason of the operation of the Wartime Suspension Statute, and all Counts were sufficiently drawn. The judgment below should be affirmed.

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No. 13023

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

AL FREED, FRED JOHNSON and RALPH KUSHNER,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

Foreword.

Appellant's Opening Brief contains three points of law, the first two of which were each divided into two sub-points of law.

The Appellee's brief, contains three points of law, the first two of which are in answer to the two sub-points of Appellant's first contention, the third Appellee's point being in answer to Appellant's third point of law. For such reason, said matters will be presented, indicating the contentions of both Appellant and Appellee on the controverted matters of law.

The second point of law, as contended for by Appellant, namely, "Having plead *nolo contendere*, the appellant may, upon appeal, contend that the counts to which he made such plea, do not state a public offense by reason of the fact that they are barred by the statute of limitations," is not considered or denied in Appellee's brief and the correctness of the law therein stated is inferentially thus conceded.

Statement of Facts.

Although worded differently, the Statement of Facts in Appellant's Opening Brief and Appellee's Brief essentially are in conformity.

Chronologically, they indicate as follows:

January 27, 1947, acts complained of in Count Four (4) of the Indictment, were committed [Tr. of Rec. p. 5].

February 6, 1947, acts complained of in Count Two (2) of the Indictment, were committed [Tr. of Rec. p. 4].

June 28, 1950, Federal Grand Jury returns Indictment [Tr. of Rec. p. 6].

July 7, 1950, Appellant files Motion to Dismiss and Quash on the ground that Counts Two (2) and Four (4) and others are barred by the Statute of Limitations [Tr. of Rec. p. 8].

August 28, 1950, Appellant filed Motion for Bill of Particulars [Tr. of Rec. p. 9].

September 25, 1950, court denies Motion for Bill of Particulars and Motion to Dismiss and Quash [Tr. of Rec. p. 38].

October 30, 1950, Appellant plead not guilty to all Counts of the Indictment.

April 24, 1951, Appellant withdrew his plea as to Counts Two and Four and plead *nolo contendere* to said Counts.

June 4, 1951, Appellant is sentenced to six (6) months imprisonment on Count Two (2) and a fine of \$1,000.00 on Count Four (4).

ARGUMENT.

I.

That Counts Two (2) and Four (4) of the Indictment Are Barred by the Statute of Limitations and Particularly Title 18 of the United States Code—Crimes and Criminal Procedure, Section 3282.

Appellant's Contention.

That said Section 3287 is Inapplicable to the Offenses charged in Counts Two (2) and Four (4) of the Indictment. (Appellant's Op. Br. p. 8.)

Appellee's Contention.

Section 3287 of Title 18 of the United States Code, Known as the Suspension Act, or Statute, is Applicable to Section 1731(a) of Title 12 of the United States Code. (Appellee's Br. p. 9.)

The respective contentions of each party on this issue of law is dependent upon the distinguishment of the cases of *United States v. Gottfried*, 165 F. 2d 360, relied upon by Appellee and *Marzani v. United States*, 168 F. 2d 133, relied upon by Appellant.

As pointed out in Appellee's Brief, three trial courts have written decisions which followed the *Gottfried* case (Appellee's Br. p. 12). Likewise, one of the District Court Judges of this District, has so ruled (Appellee's Br. p. 12). As far as diligent research can produce, these appear to be the only instances where the decision of *United States v. Gottfried* was followed. The *Marzani* case, however, has received the approval of numerous cases, including United States Court of Appeals for the Second Circuit, which was the author of the *Gottfried* decision.

Although referred only in its footnotes, said court, in *United States v. Obermeier*, 186 F. 2d 243, followed the theory of the decision of the *Marzani* case and relied upon *United States v. Novack*, 271 U. S. 201; *United States v. McElvain*, 272 U. S. 633, and *United States v. Scharton*, 285 U. S. 518, as the authorities for such decision, which cases were likewise the authorities for the *Marzani* decision.

The more recent decisions of trial courts have likewise followed said decisions and have expressly adhered to the rule established in *Marzani v. United States*, *supra*.

In the case of *McGuinness v. United States*, 77 A. 2d 22, arising in the District of Columbia and decided on December 1, 1950, the Court of Appeals for said district held in reversing a judgment in a criminal proceeding, wherein the defendant illegally passed checks payable to the Treasurer of the United States, more than three years prior to the bringing of the Indictment. In reversing the judgment and holding that the Wartime Suspension of Limitations Act (18 U. S. C. A., Sec. 3287) was inapplicable, the court held on page 24:

“This concession was a necessary one under the reasoning of *Marzani v. United States*, 83 U. S. App. D. C. 78, 168 F. 2d 133, affirmed by an equally divided court 335 U. S. 895, 69 S. Ct. 299, 93 L. Ed. 431, reaffirmed upon rehearing by an equally divided court 336 U. S. 922, 69 S. Ct. 513, 93 L. Ed. 1084; *United States v. Gilliland*, 312 U. S. 86, 61 S. Ct. 518, 85 L. Ed. 598; *United States v. Scharton*, 285 U. S. 518, 52 S. Ct. 416, 76 L. Ed. 917; *United States v. McElvain*, 272 U. S. 633, 47 S. Ct. 219, 71 L. Ed. 451; *United States v. Noveck*, 271 U. S. 201, 46 S. Ct. 476, 70 L. Ed. 904. These cases did not

involve the District of Columbia bad check law, but they did involve other statutes, such as the False Claims Act, wherein it was charged that defrauding the United States had resulted from the crime committed. The courts decided that statutes extending periods of limitation were to be liberally construed in favor of repose and held to apply only to cases shown to be clearly within their purposes. The conclusions were reached that the Wartime Suspension of Limitations Act and other Statutes allowing longer period of limitation were not applicable."

The last reported case upon the subject matter is that of *United States v. Shoso Nii*, 95 Fed. Supp. 971, decided in the United States Circuit Court of Hawaii on April 27, 1951. In said case, the defendant was charged with making false statements in the procuring of a passport. He was indicted more than three years thereafter and the question presented, was the applicability of the War-time Suspension of Limitations Act. In holding that the same was not applicable and that the offenses alleged in the Indictment were outlawed, Judge Metzger held at page 972:

"The defendant, however, earnestly contends that Section 3287 is not applicable, for the reason that Section 220, *supra*, does not in so many words involve 'fraud or attempted fraud against the United States.'

"Such a construction of Section 220 may seem to be strained, but it is literally true and such construction seems to find support in the interpretation given by the Supreme Court to former 18 U. S. C. A., Section 582, now Section 3282, which contained a proviso fixing the period of limitation at six years

‘in offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, . . . ’

“In *United States v. Noveck*, 271 U. S. 201, 203-204, 46 S. Ct. 476, 70 L. Ed. 904, the charge was perjury, as defined by Section 125 of the former Criminal Code. The indictment charged that the defendant made the perjurious statement ‘for the purpose of defrauding the United States’ in an income tax matter. Yet even in that case, the Supreme Court held that, since such defrauding was not ‘an element of the crime defined in Section 125, the six-year limitation could not apply: ‘The construction of sections 125 and 1044 (the latter containing the six-year proviso) contended for by the government divides perjury into two classes. It makes one include offenses having the elements specified in section 125 and the other to include those containing the further element of purpose to defraud the United States. And that would apply similarly to every offense to which the three-year period fixed by section 1044 was applicable before the proviso was added. The effect is to create offenses separate and distinct from those defined by specific enactments. Obviously that was not intended. That Act of November 17, 1921, merely added a proviso to a statute of limitations. Statutes will not be read to create crimes, or new degrees or classes of crime, unless the purpose so to do is plain. The language in question does not require the construction contended for. Indeed it is not all appropriate for the making of such classifications or the creation of offenses. Its purpose is to apply the six-year period to every case in

which defrauding or an attempt to defraud the United States is an ingredient under the statute defining the offense. There are several such offenses. Section 37 affords an illustration. But perjury as defined by section 125 does not contain any such element.'

"In *United States v. Scharton*, 285 U. S. 518, 521-522, 52 S. Ct. 416, 76 L. Ed. 917, the charges set forth attempts to evade income taxes by falsely understating taxable income. The statute punished attempts 'to evade or defeat any tax.' Yet even in that case, the Supreme Court, after taking pains to enumerate eleven statutes 'expressly making intents to defraud and element of a specified offense against the revenue laws,' added: 'And, as the section has to do with statutory crimes, it is to be liberally interpreted in favor of repose, and ought not to be extended by construction to embrace so-called frauds not *so denominated* by the statutes creating offenses. (Cases cited.) The purpose of the proviso is to apply the six-year period to cases 'in which defrauding or an attempt to defraud . . . is an ingredient under the statute defining the offense.' (Emphasis supplied.)

"In a recent case, the Court of Appeals for this Circuit refrained from expressing an opinion as to the effect of the suspension acts. *Bridges v. United States*, 9 Cir., 184 F. 2d 881, 883. In two other Circuits, however, the *Noveck* and *Scharton* cases have been construed in the same way that this Court is now interpreting them.

"The decisions referred to are *Marzani v. United States*, 83 U. S. App. D. C. 78, 168 F. 2d 133, 135-137, affirmed by an equally divided court, 335 U. S.

895, 69 S. Ct. 299, 93 L. Ed. 431, reaffirmed by an equally divided court, 336 U. S. 922, 69 S. Ct. 513, 93 L. Ed. 1075; *United States v. Obermeier*, 2 Cir., 186 F. 2d 243, 256-257. The latter decision, handed down on December 20, 1950, seems to have been overlooked by counsel."

It is respectfully submitted that a reading and study of all said authorities result in the conclusion that the "War-time Suspension of Limitations Act" (18 U. S. C. A., Sec. 3287) is only applicable, as held in *United States v. Obermeier, supra*, "when fraud or attempted fraud against the United States or one of its agencies is an ingredient under the statute defining the offense."

The statute under which both Counts of the Indictment herein discussed were brought, is set forth in full on pages 16 and 31 of Appellant's Opening Brief and page 4 of Appellee's Brief. Nowhere in said statute (Title 12, Sec. 1731(a), now Title 18, Sec. 1010) is fraud or attempted fraud against the United States or one of its agencies, made a statutory ingredient of the offense.

By use of a statute of the State of Louisiana (Appellee's Br. p. 11), the only state in the Union whose laws are not based upon the Common Law, Appellee seeks to read into the section, the missing ingredient of fraud or attempted fraud. Said statute is a Civil Law rule and finds no counterpart, either in Common Law or the statutes of the United States.

Not from the words of the Code section involved, but only from inferences drawn therefrom, does the Appellee seek to argue that fraud or attempted fraud, is an ingredient of the offense (Appellee's Br. p. 10).

In the notes to its decision, the Court of Appeals for the Second Circuit, in *United States v. Obermeier, supra*, noted that "In *United States v. Gilliland*, 312 U. S. 86, 61 S. Ct. 518, 85 L. Ed. 598, the offense was defined as to make fraud an ingredient." An examination of the *Gilliland* case indicates that the challenged counts of the Indictment were brought under Section 35 of the Criminal Code (18 U. S. C. A., Sec. 80) which prohibited the making "in any matter within the jurisdiction of any department or agency of the United States . . . (of) . . . fraudulent statements or representations." Special legislation had been passed to deal with the problem of the inter-state transportation of "Hot Oil." The President had designated the Secretary of Interior as the enforcer of such statute and he, in turn, had promulgated the regulation requiring the reports, allegedly falsely and fraudulently made. After considering said Section 35 of the Criminal Code in light of the subsequent legislations and the regulations and the regulations of the Secretary of Interior, all of which were allegedly violated, the court examined the legislative history and ascertained therefrom the meaning, "intent to defraud the United States." (See p. 94 of the Decision.)

The Court of Appeals for the Second Circuit further noted, "so, too, in *Gottfried v. United States*, 2 Cir., 165 Fed. (2d) 360 as we there interpreted the statute creating the crime." The statute alleged in the *Gottfried* case, to be violated in the Indictment, was Title 18, U. S. C. A., Section 80. The Court based its decision upon the premise, it has been the law at least since 1910, that in the statute under which this Indictment was drawn "fraud" includes conduct "calculated to obstruct or impair its" (the United States) "efficiency and destroy the value

of its operations and reports.” Said quoted law is based upon and the citations are from the case of *Haas v. Henkel*, 216 U. S. 462, 479, 30 S. Ct. 249, 254, 54 L. Ed. 569, 17 Ann. Cas. 1112, which case was decided on February 21, 1910. The only issue involved in said case was the sufficiency of an Indictment alleging a conspiracy to defraud the United States, but not alleging pecuniary loss. The acts alleged were the filing of “false cotton crop reports.” At the time said case was decided 18 U. S. C. A., Section 80, prohibited the filing of false statements “with the intent of cheating and swindling or defrauding the Government of the United States or any department thereof . . .” The *Gottfried* case did not consider the cases of *United States v. Noveck* (*supra*); *United States v. McElvain* (*supra*), or *United States v. Scharton* (*supra*), which cases were existing and established the rule that fraud or attempted fraud must be a statutory ingredient in order to make the Wartime Suspension of Limitations Act applicable. The Court justified its decision in applying said act (Title 18, Sec. 3287) by stating:

“Besides, the purpose of the amendment was not to let crimes pass unpunished which had been committed in the hurly-burly of war, an overriding motive which perfectly fits the situation at bar.”

The first of the cases establishing the rule contended for by Appellant is *United States v. Noveck*, 271 U. S. 201, 46 S. Ct. 476, 70 L. Ed. 904, decided May 10, 1926, wherein the defendant was charged with perjury (Sec. 125 of the United States Criminal Code) which provided:

“. . . ‘Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare,

depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, . . . ’”

Therein the contention of the Government was the same as that herein contended for by the Appellee. In holding the suspension provision not applicable, the Supreme Court held:

“The construction of Sections 125 and 1044 contended for by the Government divides perjury into two classes. It makes one include offenses having the elements specified in Section 125 and the other to include those containing the further element of purpose to defraud the United States. And that would apply similarly to every offense to which the three year period fixed by Section 1044 was applicable before the proviso was added. The effect is to create offenses separate and distinct from those defined by specific enactments. Obviously that was not intended. The Act of November 17, 1921, merely added a proviso to a statute of limitations. Statutes will not be read to create crimes, or new degrees or classes of crime, unless the purpose so to do is plain. The language in question does not require the construction contended for. Indeed it is not at all appropriate for the making of such classifications or the creation of offenses. Its purpose is to apply the six year period to every case in which defrauding or an attempt to defraud the United States is an ingredient under the statute defining the offense.”

The next case establishing such rule is *United States v. McElvain*, 272 U. S. 633, 47 S. Ct. 219, 71 L. Ed.

451, decided December 6, 1926. Its decision was based upon the *Noveck* decision, which it cited as authority for its holding.

The case of *United States v. Scharton*, 285 U. S. 518, 52 S. Ct. 416, 76 L. Ed. 917, decided April 11, 1932, made definite the rule contended for. In it, the defendant was charged with violation of Title 26, U. S. C. A., Section 1266, which provided as follows:

“Any person . . . who willfully attempts in any manner to *evade* or *defeat* any tax imposed by this title or the payment thereof shall . . . be guilty of a felony . . .” (Emphasis ours.)

The Government appealed from a ruling that the Suspension Act was not applicable, contending that the words “evade or defeat” inferred defrauding or attempting to do so. In regard thereto, the Court holds at page 520 as follows:

“The appellant contends fraud is implicit in the concept of evading or defeating; and asserts that attempts to obstruct or defeat the lawful functions of any department of the Government (*Haas v. Henkel*, 216 U. S. 462, 479, 480, 54 L. ed. 569, 576, 577, 30 S. Ct. 249, 17 Ann. Cas. 1112) or cheat it out of money to which it is entitled (*Capone v. United States* (C. C. A. 7th) 76 A. L. R. 1534, 51 F. (2d) 609, 615) are attempts to defraud the United States if accompanied by deceit, craft, trickery or other dishonest methods or schemes, *Hammer-schmidt v. United States*, 265 U. S. 182, 188, 68 L. ed. 968, 970, 44 S. Ct. 511. Any effort to defeat or evade a tax is said to be tantamount to and to possess every element of an attempt to defraud the taxing body.”

After denying the Government's contention, the Court concludes at page 521, that:

"There are, however, numerous statutes expressly making intent to defraud an element of a specified offense against the revenue laws. Under these, an indictment failing to aver that intent would be defective; but under Section 1114 (b) such an averment would be surplusage, for it would be sufficient to plead and prove a willful attempt to evade or defeat. Compare *United States v. Noveck*, 271 U. S. 201, 203, 70 L. ed. 904, 905, 46 St. Ct. 476.

"As said in the *Noveck Case*, statutes will not be read as creating crimes or classes of crimes unless clearly so intended, and obviously we are here concerned with one meant only to fix periods of limitation. Moreover, the concluding clause of the section, though denominated a proviso, is an excepting clause and therefore to be narrowly construed. *United States v. McElvain*, 272 U. S. 633, 639, 71 L. ed. 451, 453, 47 S. Ct. 219. And as the section has to do with statutory crimes it is to be liberally interpreted in favor of repose, and ought not to be extended by construction to embrace so-called frauds not so denominated by the statutes creating offenses. *United States v. Hirsch*, 100 U. S. 33, 25 L. ed. 539; *United States v. Rabinowich*, 238 U. S. 78, 87, 88, 59 L. ed. 1211, 1214, 1215, 35 S. Ct. 683, 42 Am. Bankr. Rep. 843; *United States v. Noveck*, 271 U. S. 201, 70 L. ed. 904, 46 S. Ct. 476, *supra*; *United States v. McElvain*, 272 U. S. 633, 71 L. ed. 451, 47 S. Ct. 219 *supra*. The purpose of the proviso is to apply the six year period to cases 'in which defrauding or an attempt to defraud the United States is an ingredient under the statute defining the offense.' *United States v. Noveck*, 271 U. S. 201, 70 L. ed. 904, 46 S. Ct. 476, *supra*."

Thus, the Supreme Court chose not to follow either the case of *Haas v. Henkel* (*supra*), upon which the *Gottfried* decision was based, or the case of *Hammerschmidt v. United States*, 265 U. S. 182, upon which the trial court herein held that the challenged Counts of the Indictment were not outlawed [Tr. of Rec. p. 48].

Based upon said cases of *United States v. Noveck*, *supra*; *United States v. McElvain*, *supra*, and *United States v. Scharton*, *supra*, the case of *Marzani v. United States*, *supra*, summarize the rule contended for by Appellant. This case is cited at length in Appellant's Opening Brief (Appellant's Op. Br. pp. 10, 12-15) and further quotation therefrom would be repetitious. Said case quotes at length from the aforesaid three cases and concludes therefrom, with the resume of the law applicable.

Also based upon the *Noveck*, *McElvain* and *Scharton* cases, the Court of Appeals for the Second Circuit, followed the contended for rule of law in the case of *United States v. Obermeier*, 186 F. 2d 243. This is the last expression by a Court of Appeals of the United States upon the subject matter. In said case, a Writ of Certiorari was denied by the United States Supreme Court on March 26, 1951 (340 U. S. 951, 95 L. Ed. 452). In said case, the Indictment alleged the violation of Title 8, U. S. C. A., Section 746, which provides as follows:

“(a) It is hereby made a felony . . .

“(b) Knowingly to make a false statement under oath, either orally or in writing, in any case, proceeding or matter relating to, or under, or by virtue of any law of the United States relating to naturalization or citizenship.”

The Statement of Law of the *Obermeier* case (see Op. Br. p. 15), being supported by the aforesaid author-

ities, the only objection of the Appellee thereto is that "In the *Obermeier* case the Court devotes two paragraphs at the end of a rather lengthy decision, to discuss the applicability of Section 3287 of the Suspension Act to an indictment charging a false statement under oath in a matter relating to naturalization and citizenship." The only merit of such objection is its uniqueness. It is respectfully submitted that it is not the quantity of the citation but its quality that invites the respect of this Honorable Court. Appellee's objection to the *Obermeier* case on the ground of the brevity of the pertinent portions and their position at the conclusion of the decision, is more applicable to the case of *United States v. Gottfried*, *supra*, since the *Obermeier* case devotes two paragraphs and the *Gottfried* case only one paragraph, both at the end of the respective decisions, to the discussion of the applicability of the Suspension Act.

The present-day acceptance of the *Marzani* case is indicated by *McGuinness v. United States*, *supra*, and *Shoso Nii*, *supra*, each of said cases following expressly the *Marzani* case and indicating its adherence to the *Noveck*, *McElvain* and *Scharton* cases.

It is respectfully submitted that the law applicable is that pronounced in *United States v. Noveck*, *supra*; *United States v. McElvain*, *supra*, and *United States v. Scharton*, *supra*, and the subsequent cases adhering to the legal principles therein established, namely, *Marzani v. United States*, *supra*; *United States v. Obermeier*, *supra*, and the other cases herein cited.

The conclusion of the Appellee that "this Court has already suggested a preference for the broad rule of the *Gottfried* decision in *Furrow v. Koutsky-Brennan-Vana Company*, 182 F. 2d 496, and *Danebe Lumber Company*

v. Koutsky-Brennan-Vana, 182 F. 2d 489.” finds no support in the reading of said decisions. In both of said decisions, this Honorable Court calls attention to the existence of a conspiracy “to defraud the United States under the then Section 37 of the Criminal Code, 18 U. S. C. A., Section 88 (now Sec. 371).” An examination of said Section 37 of the Criminal Code indicates that the crime prohibited is statutorily defined “if two or more persons conspire . . . to *defraud* the United States in any manner.” (Emphasis ours.) Thus, said cases support the rule contended for by Appellant, since fraud or attempted fraud is a statutory ingredient of the offense.

In the within case, Count One (1) of the Indictment alleged a conspiracy under said section (18 U. S. C. A., Sec. 88). No attempt was made to dismiss or quash said count on the ground that it was barred by the Statute of Limitations [Tr. of Rec. p. 8]. Subsequently, said count was dismissed as to Appellant [Tr. of Rec. p. 43].

It is respectfully submitted that Section 3287 is inapplicable to the offenses charged in Counts Two (2) and Four (4) of the Indictment, since both of said Counts are brought under former Section 1731(a) of Title 12, which does not make fraud or attempted fraud of the United States, or any of its agencies, an ingredient of the offenses defined.

Appellant's Contention.

That if the Suspension Act was applicable, the Offenses charged in Counts Two (2) and Four (4) of the Indictment would still be barred by the Statute of Limitations. (Appellant's Op. Br. p. 20.)

Appellee's Contention.

The operation of Section 3287 of Title 18 of the United States Code allows the prosecution of Counts Two and Four of the Indictment at any time up to January 1, 1953. (Appellee's Br. p. 15.)

The respective contentions of the Appellant and Appellee on this issue concerns the matter of interpretation of the word "suspended." Appellant contends that the word as used in Section 3287 should be interpreted in its common meaning, namely, that for the period therein provided, the usual statute of Limitations is suspended and becomes effective and operative upon the termination of the Suspension Act.

Appellee contends that the same is "tolled" (see Appellee's Br. p. 16), and that it commences upon the termination of the Suspension Act. Appellant, at length, cites cases dealing with prior Suspension Acts, particularly those during the Civil War period which support the contentions of Appellant. Appellee relies solely upon the cases of *United States v. Bridges*, 86 Fed. Supp. 922, and *Danebo Lumber Co. v. Koutsky-Brennan-Vana Co.*, *supra*.

The court's attention is respectfully invited to the fact that this Honorable Court expresses no preference of theory in the *Bridges* case, but merely states the existence of the diverse opinions in the *Gottfried* and *Marzani* cases and concludes therefrom that there was a substantial matter presented in the appeal of the Appellant, which justified his being allowed to be on bail pending such appeal (Appellant's Op. Br. p. 18).

Hereinbefore, at length, Appellant has invited the court's attention that the *Danebo Lumber Co. v. Koutsky-Brennan-Vana Co.*, *supra*, involves a statute which is subject to the Suspension Act by reason of the fact that fraud against the United States or one of its agencies is a statutory ingredient of the offense charged. In neither of said cases does this Honorable Court discuss or decide

whether, under the Suspension Act, the Statute of Limitations is “suspended” or “tolled.”

In its ordinary sense, the word *suspend* means “to cause to cease *for a time* from operation or effect.” (Emphasis ours.) (Webster’s New 20th Cent. Dict. 1951 Ed.) When defined by the courts, the same meaning has been adhered to. In Black’s Law Dictionary, the term *suspended* is defined to mean “to interrupt; to cause to cease for a time; to discontinue temporarily but with an expectation or purpose of resumption.” Cited in said work as authorities therefore, are the cases of *Reeside v. United States*, 8 Wall. 42, 19 L. Ed. 318; *Kriebel v. United States*, 10 F. 2d 762, 764, and *United States v. Felder*, 13 F. 2d 527, 528. Citing said Federal cases, Corpus Juris, in Volume 60, at page 1190, defines the word *suspend* as meaning

“to cease temporarily from operation or activity; also to cause to cease for a time; to cause to cease for a time from operation or effect; to delay; to hinder from proceeding; to hinder the proceedings for a time; to hold in a state of indecision or indetermination; to interrupt; to intermit; to stay; to stay and delay; to stop payment or not to meet obligations or engagements; to withhold for a time on certain conditions.”

An examination of the cases cited concerning prior Suspension Acts (see Appellant’s Op. Br. p. 22) indicates the well established principle of law that where a Statute of Limitation is *suspended*, the period of suspension is excluded but that upon the conclusion of such period, the statute is restored to all intents as if such suspension had not occurred. It is respectfully submitted that logic supports this method of computation.

As pointed out in the *Gottfried* case, the purpose of the Suspension Act is “not to let crimes pass unpunished which have been committed during the hurly-burly of war.” Section 3287 herein discussed, allows the Government a period of three years after the “hurly-burly of war has ceased” in which to bring to trial persons who committed offenses prior to the termination of hostilities.

The court is requested to take judicial notice of the fact that the chaotic condition and inefficiency of operation that are the natural consequences of war, ceased by the end of 1946. The President of the United States proclaimed the cessation of hostilities as of December 31, 1946. Thereafter the Government of the United States had a full three year period in which to prosecute offenses which were subject to such Suspension Act.

It is respectfully submitted that there is no legal basis for allowing the Government a period of six years in which to commence such prosecution. Subsequent to the 31st day of December, 1946, the reason for the Suspension Act no longer existed. War conditions no longer either impaired or curtailed the prosecution of those who violated Federal Statutes.

A reading of the Suspension Act itself contains the element that the effectiveness of its provisions terminates three years after such proclamation of the President. The offenses herein were alleged to have been committed subsequent to the proclamation of the President. No conditions impaired the prosecution of Appellant within the usual three year period. The Indictment could have been as efficiently brought in January of 1950, as it was in June of the same year.

It is respectfully submitted that after the lapse of three years, following the proclamation of the President

of the United States as to the termination of hostilities, the usual statutes of limitations were restored and resumed their effectiveness and that their provisions became applicable and that the provisions of Section 3282 thereupon provided and required that “no person shall be *prosecuted*, tried or *punished* for any offense, not capital, *unless the indictment is found . . . within three years next after such offense shall have been committed.*” (Emphasis ours.)

II.

Having Plead *Nolo Contendere*, the Appellant May, Upon Appeal, Contend That the Counts to Which He Made Such Plea, Do Not State a Public Offense by Reason of the Fact That They Are Barred by the Statute of Limitations.

Appellant's Contention.

That pleading either the occurrence within the statute of limitations or elements that extend the statute of limitations is jurisdictional to a criminal charge. (Appellant's Op. Br. p. 23.)

That after a plea of *nolo contendere*, the Appellant may appeal upon the ground that the indictment or counts thereof to which he pleaded to not constitute a public offense. (Appellant's Op. Br. p. 27.)

Appellee's Contention.

None.

None.

Under the within point of law, Appellant made the contentions above contained. The Appellee makes no argument contrary thereto, nor does it not challenge, distinguish or deny the authorities cited by Appellant nor cite contrary authorities.

It is therefore respectfully submitted that Appellee concedes the correctness of Appellant's said contentions of law.

III.

Appellant's Contention.

That Count Four (4) of the Indictment does not state a public offense in that it is not indicated therein that the application therein described was for credit or the amount thereof. (Appellant's Op. Br. p. 31.)

Appellee's Contention.

Count Four of the Indictment states a public offense and is otherwise sufficient. (Appellee's Op. Br. p. 17.)

The failure of Count Four (4) to allege that the credit application therein referred to, applied for or requested a credit or the amount of such credit, is conceded by Appellee. It is probable that this omission was in fact a typographical error, but such fact does not make the same sufficient as a legal pleading in a criminal procedure. True, such Count does allege that Appellant and others "for the purpose of obtaining a loan and an advance of credit" and "with the intent that such loan and advance of credit should be offered to the Federal Housing Administration for insurance . . . did prepare and present . . . a written Federal Housing Administration Title One Credit Application," all of which refers to the actions of the Appellant and others charged in said count.

The Count does not contain the necessary elements (found in all other counts) that the actual "written Federal Housing Administration Title One Credit Application" either: (1) applied for or requested credit, or (2) the specific amount, if any, of the credit applied for or requested. The only descriptive matter of such application contained in the Indictment was that "said application stating and representing that said credit was to be used for the purchase of materials for additions and improvements to a dwelling house," giving the address thereof, it being further alleged that "the defendants then knew that the loan and credit so applied for was not to be used for the purchase of materials or additions and improvements to a dwelling house at the aforesaid address . . . but was to be used for the purchase of materials for the construction of a new dwelling house." The "application" thus referred to was legally a nullity since it actually applied for nothing and as far as the facts are alleged, was blank and omitted any reference to applying for or requesting any credit or stating any amount of credit desired. In its alleged form, it could neither be "offered to or accepted by the Federal Housing Administration." It was similar to addressing a written instrument to the Federal Housing Administration and leaving the same with the designated bank, such instrument stating only the name, age and occupation of the signator thereto, all of which might be false.

The contentions of Appellant, that the omitted facts were matters of substance and that their omission constituted a fatal defect, is basically unanswered by the Appellee who solely contends that Appellant failed to make reasonable and appropriate application or information as to the omitted facts.

This conclusion is predicated upon the fact that Appellant sought in his request for a Bill of Particulars, to obtain additional information as to each of the numerous counts of the Indictment and that “there is nothing in the Bill of Particulars to indicate that Appellant distinguished Count Four (4) from the other Counts of the Indictment” (see Appellee’s Br. p. 18). Had the request for a Bill of Particulars been granted, the information requested was inclusive enough that a reasonable answer thereto should have furnished the omitted particulars.

It is respectfully submitted that the omission of the aforesaid allegations from Count Four (4) caused the same to violate Federal rules of Criminal Procedure (Rule 7(c)) since the Count in its existing form is not “a plain, concise and written statement of the essential facts constituting the offense charged.” It is further respectfully submitted that as a consequence thereof, Count Four (4) of the Indictment does not state a public offense.

Conclusion.

It is respectfully submitted that the plea of *nolo contendere* of Appellant to Counts Two (2) and Four (4) of the Indictment is ineffective, since said counts are both upon the facts therein stated, barred by the Statute of Limitations, and Count Four (4) fails to state essential matters of substance. It is further respectfully submitted that for such reasons the Judgment and Commitment [Tr. of Rec. p. 40] of the trial court should be reversed by this Honorable Court.

Respectfully submitted,

EUGENE L. WOLVER,

Attorney for Appellant.

No. 13025

United States
Court of Appeals
for the Ninth Circuit.

E. R. CRAIN and FINTON J. PHELAN, JR., on
Behalf of Themselves and Other Persons
Similarly Situated,

Appellants,

vs.

The Government of Guam,

Appellee.

Transcript of Record

Appeal from the District Court of Guam,
Territory of Guam.

FILED

NOV - 6 1951

No. 13025

**United States
Court of Appeals**
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E. R. CRAIN and FINTON J. PHELAN, JR., on
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Appellee.

Transcript of Record

**Appeal from the District Court of Guam,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

CRAIN & PHELAN,

E. R. CRAIN,

FINTON J. PHELAN, JR.;

Aflague Building,

Agana, Guam;

Attorneys for the Plaintiffs.

KNIGHT G. AULSBROOK,

Attorney General;

Administration Building,

Agana, Guam;

Attorney for the Defendant.

The District Court of Guam

Civil No. 10-51

E. R. CRAIN and FINTON J. PHELAN, JR.,
on Behalf of Themselves and Other Persons
Similarly Situated,

Plaintiffs,

vs.

THE GOVERNMENT OF GUAM,

Defendant.

COMPLAINT

1. The action arises under Public Law 630, 81st Congress, Chapter 512, 2nd Section (The Organic Act of Guam).

2. Plaintiffs are citizens of the United States and residents of the unincorporated territory of Guam and bring this action as a class action on behalf of themselves and all other persons resident on Guam, said persons being too numerous to join herein as parties plaintiff, deriving income from sources within the said unincorporated territory of Guam.

3. The unincorporated territory of Guam, by statute, has the status of a possession of the United States of America.

4. The government of Guam, created by the Organic Act of Guam, is a government of limited powers as defined by said Organic Act of Guam.

5. The Internal Revenue Code of the United

States, including within said Code the Income Tax Law of the United States, was in full force and effect within Guam prior to the enactment of the Organic Act of Guam, and the said Internal Revenue Code of the United States has not been suspended or repealed by the said Organic Act of Guam or by any other act of the Congress of the United States.

6. The Organic Act of Guam specifically reaffirms the application in Guam of the income tax sections of the Internal Revenue Code of the United States.

7. The government of Guam, through its officers, agents and servants, has asserted the right to collect an income tax, citing authority alleged to be granted to it by the Organic Act of Guam, which authority and right do not in fact exist.

8. The government of Guam, acting through its officers, agents and servants has procured the publication of numerous notices, statements and claims with respect to alleged income tax procedures and payments due to the government of Guam, and copies of such notices, statements and claims have been published in the daily press and have been served upon and delivered to plaintiffs and others.

9. The acts and actions of the officers, agents and servants of the government of Guam, as more particularly described in numbered paragraphs 7 and 8 herein, constitute a violation of the provisions of subsections (e) and (f) of Section 5 of the Organic Act of Guam.

10. The acts of the officers, agents and servants of the government of Guam, as set out in numbered paragraphs 7 and 8 herein, constitute an invasion of the legislative prerogatives of the Congress of the United States by enacting by executive interpretation an income tax law for the unincorporated territory of Guam, and an attempt to incorporate the same into the Organic Act of Guam.

11. The acts and actions of the officers, agents and servants of the government of Guam, as set out in numbered paragraphs 7 and 8 herein, is an attempt to superimpose by administrative determination the full weight and burdens of the United States Income Tax Statutes as a territorial tax upon the plaintiffs and others who are already subject to the provisions of said United States Income Tax Stautes.

12. As a result of the acts and actions set out in numbered paragraphs 7 and 8 herein, irreparable damage will be suffered by the plaintiffs in this action, and no adequate remedy exists at law by which plaintiffs may seek relief.

Wherefore, plaintiffs demand that the Court adjudge:

(1) That the Internal Revenue Code of the United States applies to Guam as written.

(2) That the unincorporated territory of Guam is, with respect to the United States, a possession.

(3) That the government created by the Organic

Act of Guam is a government of limited and express powers.

(4) That the Income Tax Laws of the United States are not repealed or suspended by the provisions of the Organic Act of Guam.

(5) That the Organic Act of Guam does not create a territorial income tax.

(6) That the government of Guam, its officers, agents and servants be restricted from attempting to collect such alleged territorial income tax.

(7) That the Court grant such other and further declaratory relief as within its discretion may be deemed appropriate by it.

(8) That plaintiffs recover their costs.

CRAIN & PHELAN,

By /s/ FINTON J. PHELAN, JR.,

Attorneys for Plaintiffs.

[Endorsed]: Filed April 17, 1951.

[Title of District Court and Cause.]

SUMMONS IN A CIVIL ACTION

To the above-named Defendant:

You are hereby summoned and required to serve upon Crain and Phelan, plaintiff's attorney, whose address, Suite 101, Aflague Building, Agana, Guam; an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

[Seal] /s/ ROLAND A. GILLETTE,
Clerk of Court.

Date April 17, 1951.

Return on Service of Writ attached.

[Endorsed]: Filed April 20, 1951.

[Title of District Court and Cause.]

MOTION TO DISMISS

Defendant entering a special appearance for the purpose of this motion and for no other purpose moves the court to dismiss the complaint and the action herein on the following grounds:

1. This is an improper class action.
2. Plaintiffs failed to join an indispensable party.
3. The court lacks jurisdiction over the defendant.
4. The court lacks jurisdiction over the subject matter.

5. The complaint fails to state a claim upon which relief can be granted.

This motion is based upon all the records and files herein, and upon the written statement of reasons in support of the motion and a list of citations of the authorities on which defendant relies, which said statement and list are attached hereto and by this reference made a part hereof.

/s/ KNIGHT G. AULSBROOK,
Attorney General,
Attorney for Defendant.

Copy received.

[Title of District Court and Cause.]

NOTICE OF MOTION

To E. R. Crain and Finton J. Phelan, Jr. and other persons similarly situated, and their attorneys Crain & Phelan:

Please take notice, that the undersigned will bring the foregoing motion on for hearing before this court in its courtroom in the Guam Congress Building, Agana, Guam at 9:00 o'clock a.m. on Tuesday, the 15th day of May, 1951, or as soon thereafter as counsel can be heard.

/s/ KNIGHT G. AULSBROOK,
Attorney General, Government of Guam, Attorney
for Defendant.

[Endorsed]: Filed May 9, 1951.

The District Court of Guam for the
Unincorporated Territory of Guam

Civil No. 10-51

E. R. CRAIN and FINTON J. PHELAN, JR.,
on Behalf of Themselves and Other Persons
Similarly Situated,

Plaintiffs,

vs.

THE GOVERNMENT OF GUAM,

Defendant.

Appearances:

E. R. CRAIN, ESQ.,

FINTON J. PHELAN, JR., ESQ.,

Pro Se.

KNIGHT G. AULSBROOK, ESQ.,

Attorney General for Guam.

OPINION

Shriver, Judge

The question involved in this action is the construction to be placed on Sec. 31 of the Organic Act of Guam, 64 Stat. 392, 48 USCA 1421i which provides:

The income-tax laws in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in Guam.

Sec. 30 of the Organic Act provides that Federal

income taxes derived from Guam and certain other taxes

shall be covered into the treasury of Guam and shall be expended for the benefit and government of Guam in accordance with the annual budgets.

Sec. 31 was introduced in the House of Representatives by Congressman Miller of Nebraska as an amendment to the organic Act then under consideration and adopted. Cong. Rec., May 23, 1950, Vol. 96, pp. 7673 and 7674. In response to a question Congressman Miller stated after the adoption of the amendment:

There will be no direct payment by the Treasury of this country. The amendment we have just adopted in committee provides that the income-tax laws in force in the United States of America and which may hereafter be in force will be the law over there. That will be of great help in plugging certain loopholes. The people of Guam and a large number of civilians and workers over there on construction work, as well as military personnel, pay no income tax or have no withholding tax. In fact, they are paid a bonus for working there. This will plug that loophole and bring in some money to the United States Treasury.

The Treasury Department has construed Sec. 31 as establishing a territorial tax which sets up a separate income tax system for Guam, a duplicate of the Federal income tax system, 1951-6-13559, I.T.

4046. It would appear to be clear that the effect of Sec. 31 is to create a tax liability on Guam, insofar as the taxpayer is concerned, on the same basis as if he were resident in the continental United States and that the Government of Guam is entitled to such tax regardless of which government collects it.

The plaintiffs began this class action for a declaratory judgment holding that:

(1) The Internal Revenue Code of the United States applies to Guam as written.

(2) The unincorporated territory of Guam is, with respect to the United States, a possession.

(3) The Government created by the Organic Act of Guam is a government of limited and express powers.

(4) The Income Tax Laws of the United States are not repealed or suspended by the provisions of the Organic Act of Guam.

(5) The Organic Act of Guam does not create a territorial income tax.

(6) The Government of Guam, its officers, agents and servants be restricted from attempting to collect such alleged territorial income tax.

(7) The Court grant such other and further declaratory relief as within its discretion may be deemed appropriate by it.

The defendant moved to dismiss the complaint upon the grounds that:

(1) It is an improper class action.

(2) Plaintiffs failed to join as indispensable party.

(3) The court lacks jurisdiction over the defendant.

(4) The court lacks jurisdiction over the subject matter.

(5) The complaint fails to state a claim upon which relief can be granted.

In view of the dependence of the Government of Guam on the proceeds of the income tax to meet its budgetary requirements and the public importance of the question, the court has gone further in outlining its views as to the creation of a tax liability than would be required to dispose of the motion to dismiss.

Discussion

The Government of Guam was established by the Organic Act of Guam, Sec. 3 of such Act, 64 Stat. 384, USCA 1421a provides:

Guam is declared to be an unincorporated territory of the United States and the capitol and seat of government thereof shall be located at the city of Agana, Guam. The government of Guam shall have the powers set forth in this chapter and shall have power to sue by such name. The government of Guam shall consist of three branches, executive, legislative, and judicial, and its relations with the Federal Government shall be under the general administrative supervision of the head of such civilian

department or agency of the Government of the United States as the President may direct.

It has been held that territorial governments so created are immune from suit without their consent even when the Organic Act provided that they could be sued. *People of Porto Rico v. Ramos* 34 S. Ct. 461, 232 U.S. 627; *A. J. Trestani Sucrs Inc., v. Bussoglia* 166 F. 2d. 966.

The Government of Guam has not consented to this action against it and it is the court's opinion that it is immune from suit without its consent. It follows that the court has no jurisdiction over the defendant.

The purpose of the action is to obtain a declaratory judgment to the effect that the Government of Guam has no authority to impose or collect a tax under the provisions of Sec. 31, *supra*, but that this section must be construed in relationship to other applicable provisions of the United States Internal Revenue Code; that any tax imposed by Sec. 31 is the concern of the United States Government and not the Government of Guam. Even assuming that the Government of Guam had waived its immunity from suit, this court could not take jurisdiction. As was stated in *Noland v. Westover, et al.*, 9 Cir. 172 F. 2d. 615.

The only definite relief asked is for a declaratory judgment, but the statute authorizing the district court to render a declaratory judgment does not authorize its application in controversies in respect of tax problems. 28 USCA,

2201; Red Star Yeast and Products Co., v. La Biddle, 7 Cir., 83 F. 2d. 394; Wilson v. Wilson, 4 Cir., 141 F. 2d. 599.

ORDER

The court does not consider it necessary to discuss other grounds raised by the motion to dismiss. For the foregoing reasons the complaint is dismissed without leave to amend.

Dated at Agana, Guam, this sixteenth day of May, A. D. 1951.

/s/ PAUL D. SHRIVER,
Judge, District Court of
Guam.

[Endorsed]: Filed May 16, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO COURT OF APPEALS NINTH CIRCUIT

Notice is hereby given that E. R. Crain and Finton J. Phelan, Jr., appellants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the order entered in this action on the sixteenth day of May, A. D. 1951.

CRAIN & PHELAN,

By /s/ E. R. CRAIN,
Attorneys for Appellants.

[Endorsed]: Filed June 13, 1951.

District Court of Guam

Civil No. 10-51

Before: The Honorable Paul D. Shriver, Judge.

E. R. CRAIN and FINTON J. PHELAN, JR.,
on Behalf of Themselves and Other Persons
Similarly Situated,

Plaintiffs,

vs.

THE GOVERNMENT OF GUAM,

Defendant.

TRANSCRIPT OF PROCEEDINGS

Excerpts of
May 15, 1951

Appearances:

For the Plaintiffs:

PRO SE.

For the Defendant:

RUSSELL STEVENS,

Assistant Attorney General,

Government of Guam.

(On Defendants' Motion to Dismiss.)

* * *

Mr. Stevens: Number three; the court lacks jurisdiction over the defendant. This point was decided by your Honor in the case of Joaquina Castro Aguan, et al., vs. the Government of Guam, civil

case 5-51, which was decided here on April 5, 1951.

Number four; the matter of the jurisdiction of this court over the subject matter. There are two points under that:

The first one is that the jurisdictional amount which is a mandatory provision is not provided for in the complaint. There is no way of ascertaining in the complaint what is involved in the way of money; that is a point which must be clarified. Section 1331, covered in 28 U.S.C.A., provides for the jurisdictional amount as does Rule 8(a) which does not provide a specific amount as does Section 1331.

* * *

and, as I mentioned above, I don't think this court has jurisdiction because of 2201, 28 U.S.C.A. To take jurisdiction—I think it is just out of the jurisdiction, I think——

The Court (Interrupting): In other words, they have to take one position or the other?

Mr. Stevens: Yes, sir.

The Court: If they take the position that you have no authority and that all the authority rests in the United States Government, then they are out by virtue of the rule which does not give this court authority in matters involving federal taxes.

Mr. Stevens: Yes, sir, that is our contention exactly.

* * *

Mr. Phelan: The Collector of Internal Revenue of the United States has ruled the territorial tax to be administered by the Government of Guam. Now,

the Government of Guam comes in here and says that it is a federal tax; I think the Government of Guam should adequately determine what it is.

The Court: I didn't understand Mr. Stevens to say that it is a federal tax in that sense; I think what he meant was that if it isn't a territorial tax to be collected by the United States Government, the court has no jurisdiction.

Mr. Phelan: There is no attempt made by this case to stop the collection of a United States tax owed to the United States. We are seeking in this action for a declaratory judgment under Public Law 630, the Organic Act of Guam. It is my contention that in asking a declaratory judgment, as to what the statute means, we do not need to state any jurisdictional amount, no amount is necessary.

The Court: Don't your statutes require that, in a case where you are asked to construe a federal law, unless it is a type of thing which cannot be measured in money, such as the Discrimination Civil Rights Statute and that sort of thing, that there must be the jurisdictional amount stated?

Mr. Phelan: As I read the rule, I saw no requirement in the rule stating there must be a jurisdictional amount but it could have been easily supplied.

The Court: Yes, I merely raised that question because, of course, a new question arises under the jurisdictional amount rule.

* * *

The Court: If it is a United States tax, what jurisdiction do I have?

Mr. Phelan: We would like that thing decided: if it is a United States tax and what jurisdiction has the Government of Guam?

The Court: Well, assuming you have a valid dispute on that point; this is a court of limited jurisdiction and the laws say I do not have any jurisdiction involving federal taxes.

Mr. Phelan: Is it or is it not a federal tax? The Court has the right to determine whether it is or is not.

The Court: Well, ordinarily, if the Court does that, it should have before it all parties who want to contend that it isn't a federal tax, including the United States which contends that it is not a federal tax but a territorial tax which is imposed under federal legislation.

* * *

The Court: We have got one fundamental point: what jurisdiction does this court have over the Government of Guam?

Mr. Phelan: If the Government of Guam is a sovereignty, that is, in this type of case, that would be a question. Now there is no question that, over any subordinate agency or even of the United States in certain actions, United States Courts have jurisdiction, it is limited by the Constitution.

The Court: The only jurisdiction exercised over the Government is exercised by the Supreme Court when government sues government.

Mr. Phelan: Yes, but there are certain matters involving a state which may go into a Federal Court.

The state may go into a Federal Court, true; now the court lacks jurisdiction over the defendant. Suppose the territorial government of Guam is a government sovereignty; there is nothing in the Organic Act that creates a sovereignty here.

* * *

Mr. Phelan: But that gives local home rule; does this government enjoy the dignity of the Government of Hawaii, Alaska or one of the 48 States; does it put it beyond the reach of the United States Court?

The Court: It places the government as a sovereignty beyond the jurisdiction of the United States Court, unless the Congress of the United States specifically gave it jurisdiction or unless the Government of Guam, by its own act, submitted itself to jurisdiction. It is the old theory that the king can do no wrong; the government can submit itself to suit and if it does so, it of course is liable like any other litigant, but if it chooses not to do so and if it is an independent sovereignty, then the courts have no jurisdiction over the actions of the government.

Mr. Phelan: That is true.

The Court: Now the court may have jurisdiction over the actions of individuals——

Mr. Phelan (Interrupting): I realize that.

The Court: ——proposing to do something which is beyond their power or their authority, but the government—this intangible thing that we call government and the sovereign is in a different position.

Mr. Phelan: If it please the Court, I still contend—I believe I can find cases to support it, that relationship of the Government of Guam to the United States and to the United States Congress is similar to that of a county to the legislature of a state back home; that is, it enjoys a peculiar existence, it is definitely a governmental agency but is it entitled to the dignity of a sovereignty?

* * *

The Court: Now, what about the question of the applicability of the federal rule? Assuming that the Government of Guam is subject to suit; you ask the Court to determine that it has no authority to enforce Section 31; that such authority as exists is solely in the hands of the Government of the United States. Now you don't question that this is a tax, do you?

Mr. Phelan: I do question the fact that there is a territorial tax, I am not questioning the fact that there is a United States income tax.

The Court: Yes, exactly. Now how did we get away from the question that this court does not have action where federal taxes are involved?

Mr. Phelan: Because we are not questioning the federal tax, we are questioning the territorial tax which is being read into the Organic Act.

The Court: But you affirmatively asked the Federal Court to hold the United States Government as the only legal entity entitled to enforce that provision.

* * *

District Court of Guam
for the Territory of Guam—ss.

I, John E. Barnes, Official Court Reporter for the District Court of Guam, hereby certify that the above and foregoing transcript is composed of true and correct excerpts from the proceedings had in the above-entitled matter in said Court at the time and place as set forth.

/s/ JOHN E. BARNES,
Official Court Reporter.

[Endorsed]: Filed July 20, 1951.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE OF TRANSFER

I, Rowland A. Gillette, Clerk of the District Court of Guam for the Territory of Guam, M. I., do hereby certify that the following documents, to wit:

1. Complaint.
2. Summons, showing return of service.
3. Notice of motion. (To E. R. Crain, et al.).
4. Motion to Dismiss.
5. Memorandum in support of Motion to Dismiss.
6. List of Citations of authorities.
7. Written Opinion and Order.
8. Surety for Costs.
9. Notice of Appeal to Court of Appeals Ninth Circuit.

10. Copy of letter notifying opposing counsel of Notice of Appeal.
11. Designation of Record for Appeal.
12. Transcript of Proceedings.
13. Letter of remittal of Transcript.
14. Minutes.

are the original documents filed in the above-entitled case.

In Witness Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Agana, Guam, M. I. this 21st day of July, A. D. 1951.

[Seal] /s/ ROLAND A. GILLETTE,
Clerk of the Court.

[Endorsed]: No. 13025. United States Court of Appeals for the Ninth Circuit. E. R. Crain and Finton J. Phelan, Jr., on Behalf of Themselves and Other Persons Similarly Situated, Appellants, vs. The Government of Guam, Appellee. Transcript of Record. Appeal from the District Court of Guam, Territory of Guam.

Filed July 25, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 13025

E. R. CRAIN, et al.,

Appellants,

vs.

THE GOVERNMENT OF GUAM,

Appellee.

STATEMENT OF POINTS

Territory of Guam

Municipality of Agana—ss.

The points upon which appellants will rely upon appeal are:

1. That the court did not exercise sound discretion in refusing the plaintiff's oral motion for an extension of time to properly prepare and present points and authorities in opposition to defendant's and appellee's motion to dismiss, which motion was based upon five separate points, as follows:

(a) This is an improper class action.

(b) Plaintiffs failed to join an indispensable party.

(c) The court lacks jurisdiction over the defendant.

(d) The court lacks jurisdiction over the subject matter.

(e) The complaint fails to state a claim upon which relief can be granted.

2. That the court erred in holding that the Government of Guam was immune to suit.

3. That the court erred in ruling that it could not assume jurisdiction of the subject matter of this case.

CRAIN & PHELAN,

By /s/ FINTON J. PHELAN, JR.,
Attorneys for Appellants.

[Endorsed]: Filed August 15, 1951.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD FOR APPEAL

The following portions of the record and proceedings of the District Court of Guam in the case of E. R. Crain and Finton J. Phelan, Jr., et al. vs. the Government of Guam are designated for inclusion in the record on appeal to be submitted to the Ninth Circuit Court of Appeals:

All pleadings and supporting papers.

All motions and supporting papers.

The findings and the order of the court.

The opinion of the court.

The notice of appeal.

Such portions of the transcript of the proceedings as pertain to the question of jurisdiction.

Dated this 2nd day of July, 1951.

CRAIN & PHELAN,

By /s/ FINTON J. PHELAN, JR.,
Attorneys for Appellants.

[Endorsed]: Filed August 15, 1951.

No. 13,025

United States Court of Appeals
For the Ninth Circuit

E. R. CRAIN and FINTON J. PHELAN, JR.,
on Behalf of Themselves and Other
Persons Similarly Situated,

Appellants,

vs.

THE GOVERNMENT OF GUAM,

Appellee.

APPELLANTS' BRIEF.

Appeal from the District Court of Guam,
Territory of Guam.

CRAIN & PHELAN,

Suite 101 Aflague Building, Route 8, Agana, Guam, M.I.,

Attorneys for Plaintiff-

Appellants.

FILED

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PAUL E. O'BRIEN

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United States Court of Appeals For the Ninth Circuit

E. R. CRAIN and FINTON J. PHELAN, JR.,
on Behalf of Themselves and Other
Persons Similarly Situated,

Appellants,

vs.

THE GOVERNMENT OF GUAM,

Appellee.

APPELLANTS' BRIEF.

Appeal from the District Court of Guam,
Territory of Guam.

JURISDICTIONAL STATEMENT.

This cause was filed in the District Court of Guam seeking a declaratory judgment to determine the construction to be placed upon Section 31 of Public Law 630, 81st Congress, Chapter 512, 2nd Session. (The Organic Act of Guam.) The Plaintiffs are citizens of the United States residing in the unincorporated territory of Guam. The action is filed as a class action, since a judicial determination of this question is deemed to be of major importance to all residents of Guam. Section 2201, Chapter 151 of title 28 United

States Code Annotated gives to United States District Courts the jurisdiction to enter declaratory judgments interpreting Statutes of the United States. The District Court of Guam was created by Section 22 (a) Public Law 630, 81st Congress, Chapter 512—2nd Session, approved August 1950. Section 23 (a) of Public Law 630, 81st Congress, Chapter 512—2nd Session created in the United States Court of Appeals for the Ninth Circuit, jurisdiction of Appeals from the District Court of Guam in all cases involving Laws of the United States or any authority exercised thereunder.

This action, seeking a judicial determination of the construction of a law of the United States and equitable relief, if appropriate, is therefore within the Appellate jurisdiction of the United States Circuit Court for the Ninth Circuit.

The Complaint was filed on the 17th day of April 1951, Return of Service filed on the 20th day of April 1951. A Motion to Dismiss, by the Defendant, was filed and served upon the 9th day of May 1951. Hearing upon the Motion was on the 15th day of May, 1951 and the Judgment and Order entered and filed on the 16th day of May, 1951 dismissing the Complaint without leave to amend. Notice of Appeal was filed and served on the 13th day of June 1951. It is from this Judgment and Order that the Plaintiffs appeal.

This Act created a Civil Government for the Island of Guam, declared Guam to be an unincorporated ter-

ritory of the United States, and set forth therein the powers and limitations of the newly constituted government together with a Bill of Rights.

The government of Guam, through the Governor and other officials, after the passage of the "Organic Act", made claim that Section 31 of said Act (which reads in its entirety as follows)

"The income tax laws in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in Guam",

created a local territorial income tax and implanted into the codes of Guam the text of the United States income tax laws, substituting the word Guam for United States and substituting other words when necessary to give such law local application. I.T. 4046 issued by the Commissioner of Internal Revenue of the United States agreed with this interpretation of Section 31 and stated that thus a local territorial income tax was created. Accordingly public notices were caused to be published by the government of Guam and demand was made for the payment of this income tax to the local treasury through a Commissioner of Taxes for Guam.

The Plaintiffs contend that no local income tax was created by this Section or any other Section of the "Organic Act", that for many years prior to the passage of the "Organic Act", the entire Revenue Code of the United States had applied, subject to certain express exemptions contained therein, to Guam;

that Section 31 of the "Organic Act" constituted merely a saving clause to insure that despite the provisions of Section 25 (b) of the "Organic Act"

"(b) Except as otherwise provided in this Act, no law of the United States hereafter enacted shall have any force or effect within Guam unless specifically made applicable by Act of the Congress either by reference to Guam by name or by reference to 'possessions'."

all income tax laws of the United States would apply, both at present and in the future, to Guam; and that the "Organic Act" in no way suspended, repealed or modified the Internal Revenue Code of the United States.

Accordingly, the Plaintiffs on the 17th day of April 1951, filed a Complaint (pg. 3 of Transcript) on behalf of themselves and others similarly situated, against the government of Guam seeking a declaratory judgment that the Internal Revenue Code of the United States applies to Guam, that the unincorporated territory of Guam has the status of a possession, that the government of Guam is a government of limited and express powers, that the income tax laws of the United States are not repealed or suspended by the "Organic Act", that the "Organic Act" of Guam does not create a territorial income tax and containing a prayer to restrain the government of Guam, i.e., its officers and agents, from attempting to collect the alleged territorial income tax.

The return of service of the complaint in this action was filed on April 20, 1951 (pg. 7 of Tran-

script). The Defendant, appearing specially, filed and served on May 9, 1951 a Motion to Dismiss (pg. 7 of Transcript), based on five grounds as follows:

That the action is an improper class action.

That an indispensable party was not joined.

That the court lacks jurisdiction over the Defendant.

That the court lacks jurisdiction over the subject matter.

That the complaint fails to state a claim upon which relief can be granted.

This Motion was argued on the 15th day of May 1951 in the District Court of Guam. The Court dismissed the Complaint on the grounds that it had no jurisdiction over the Defendant and that the Court could not take jurisdiction of the subject matter. The Order and the Opinion of the Court were filed on May 16, 1951. (Pg. 9, Pg. 14 of Transcript).

The Plaintiffs filed a Notice of Appeal to the United States Court of Appeals for the Ninth Circuit on June 13, 1951. (Pg. 14 of Transcript).

It is contended by the Appellants that the Court erred in the following matters:

1. The Court did not exercise sound discretion in refusing Plaintiffs' oral motion for an extension of time to properly prepare and present points and authorities in opposition to Defendant's motion to dismiss. The motion and ruling of Court are set forth in the minutes of the Clerk.

2. The Court erred in holding that the government of Guam was immune to suit. Transcript of Record page 13.

“It has been held that territorial governments so created are immune from suit without their consent even when the “Organic Act” provided that they could be sued. *People of Porto Rico v. Ramos* 34 S. Ct. 416, 232 U.S. 627; *A. J. Trestani Sucrs Inc. v. Bussoghia*, 166 F. 2d 966.

The Government of Guam has not consented to this action against it and it is the court’s opinion that it is immune from suit without its consent. It follows that the court has no jurisdiction over the defendant.”

(Pg. 13 of Transcript).

“The Court: It places the government as a sovereignty beyond the jurisdiction of the United States Court, unless the Congress of the United States specifically gave it jurisdiction or unless the Government of Guam, by its own act, submitted itself to jurisdiction. It is the old theory that the king can do no wrong; the government can submit itself to suit and if it does so, it, of course, is liable like any other litigant, but if it chooses not to do so and if it is an independent sovereignty, then the courts have no jurisdiction over the actions of the government.”

(Pg. 19 of Transcript).

3. The court erred in holding that it could not assume jurisdiction of the subject matter of the suit.

“The purpose of the action is to obtain a declaratory judgment to the effect that the Government of Guam has no authority to impose or

collect a tax under the provisions of Sec. 31, *supra*, but that this section must be construed in relationship to other applicable provisions of the United States Internal Revenue Code; that any tax imposed by Sec. 31 is the concern of the United States Government and not the Government of Guam. Even assuming that the Government of Guam had waived its immunity from suit, this court could not take jurisdiction. As was stated in *Noland v. Westover, et al.*, 9 Cir., 172 F. 2d 615:

The only definite relief asked is for a declaratory judgment, but the statute authorizing the district court to render a declaratory judgment does not authorize its application in controversies in respect of tax problems. 28 US CA, 2201; *Red Star Yeast and Products Co. v. La Biddle*, 7 Cir., 83 F. 2d 394; *Wilson v. Wilson*, 4 Cir., 141 F. 2d 599." (Pg. 13 of Transcript).

SPECIFICATION OF ERROR I.

The learned District Judge denied the oral motion of Plaintiffs for adequate time to properly prepare and present points and authorities in opposition to Defendant's motion to dismiss. (Clerk's minutes) Five grounds were cited in support of this motion. This motion was served upon Plaintiffs on the 9th day of May 1951, and argued on the 15th day of May 1951. The court stating in the Opinion (page 12 of Transcript) that

"In view of the dependence of the Government of Guam on the proceeds of the income tax to

meet its budgetary requirements and the public importance of the question, the court has gone further in outlining its views as to the creation of a tax liability than would be required to dispose of the motion to dismiss.”

Nevertheless the court refused to permit Plaintiffs additional time to present authorities in opposition. In view of the vast public importance of the matter before the court and the fundamental and basic nature of the Points of Law to be researched and presented, denial of additional time for research and study was not the exercise of sound discretion. Reason demands that in a case of this nature the court should be fully advised and that all authorities in point be searched and presented to the court. Denial of additional time precluded this and deprived the court of the benefit of such research and authorities.

It is contended that denial of this motion deprived Plaintiffs of an opportunity to adequately present their case and further resulted in the court deciding a motion in a case of grave public import without an adequate and complete presentation of the law involved. It is contended that matters of such importance should be presented upon briefs and only after adequate research. The Plaintiffs were not granted the necessary time, and the court was deprived of the benefit of such research. It is believed that in exercising sound discretion the court should have granted the motion for more time and secured the benefit of such study. The court deprived itself of an adequate presentation of the pertinent cases and au-

thorities and deprived the Plaintiffs of an opportunity to present authorities favorable to them. To decide a case of this import upon inadequate research and authorities is, it is contended, not the exercise of sound discretion and therefore, error.

SPECIFICATION OF ERROR II.

The learned District Judge held that the government of Guam is immune to suit without its consent.

It is contended by Appellants that the court erred by so holding for the following reasons:

That Congress did not create a sovereignty when it established the government of Guam is apparent from the Provisions of Public Law 630—(The Organic Act)—pertinent portions of which read as follows:

“Section 3. Guam is hereby declared to be an unincorporated territory of the United States . . . The government of Guam . . . shall be under the general administrative supervision of the head of such civilian department or agency of the Government of the United States as the President may direct.”

“Section 6 (a) The executive authority of the government of Guam . . . shall be exercised under the supervision of the department or agency referred to in Section 3 of this Act . . .”

“Section 6 (c) The Governor shall coordinate and have general cognizance over all activities of a civil nature of the departments, bureaus and

offices of the Government of the United States in Guam.”

“Section 8. The head of the department or agency designated by the President under Section 3 of this Act may from time to time designate the head of an executive department of the government of Guam or other person to act as Governor in case of a vacancy in the office, or the disability or temporary absence of both the Governor and the Secretary, and the person so designated shall have all the powers of the Governor for so long as such condition continues.”

“Section 19. . . . All laws enacted by the legislature shall be reported by the Governor to the head of the department or agency designated by the President under Section 3 of this Act, and by him to the Congress of the United States, which reserves the power and authority to annul the same. If any such law is not annulled by the Congress of the United States within one year of the date of its receipt by that body, it shall be deemed to have been approved.”

This Act nowhere contains a grant of sovereignty. Sovereignty and its incidents have been defined:

“Vattel, in his Law of Nations (book 1, page 1) says: ‘From the very design that induces a number of men to form a society which has its common interests, and which is to act in concert, it is necessary that there should be established a public authority to order and direct what is to be done by each in relation to the end of association. This political authority is the sovereignty, and he and they who are invested with it are the

sovereign. Sovereignty in government may then be defined to be that public authority which directs or orders what is to be done by each member associated, in relation to the end of the association.'

It may be remarked, with us, the body of the nation has kept in its own hands the empire, or the right to command, and our government is therefore called a 'popular government'."

Wheaton defines sovereignty,

"the supreme power by which any citizen is governed."

Hurd says:

"The supreme power in the state must necessarily be absolute, in being subject to no judge."

Jameson says:

"By the term 'sovereignty' is meant the person or body of persons in a state to whom there is politically no superior."

Leiber has said:

"The necessary existence of the state, and that right and power which necessarily follows is sovereignty."

Story says:

"By sovereignty, in its largest sense, is meant supreme, absolute, uncontrollable power; the *jus summi imperii*; the absolute right to govern."

Yeaman, in his Study of Government, (484) says:

"This sovereignty is the last and supreme will in the direction and control of the affairs of

society, and beyond or above which there is no political power, and no legal appeal. The word which by itself comes nearest being the definition of sovereignty is will or volition, as applied to political affairs. Government is not sovereignty. Government is the machine or expedient for expressing the will of the sovereign power."

"Definitions of sovereignty might be almost indefinitely multiplied, but these which have been given I believe to be sufficient to give an accurate idea of its nature. This sovereign power in our government belongs to the people; and the government of the United States and the governments of the several states are but the machinery for expounding or expressing the will of the sovereign power." *Cherokee Nation v. Southern Kan. R. Co.*, 33 F. 900.

"(16) A. *Definition and Nature.* Sovereignty has been succinctly defined as the "supreme authority". Sovereignty has been as of two kinds—external and internal, according as it is viewed from without or from within. Internal sovereignty is that which is inherent in the people of any state, or vested in its rulers by its constitution or fundamental laws. External sovereignty consists in the independence of one political society in respect to all other political societies. A federal state enjoys external, but not internal, sovereignty, except as regards federal territory, such as colonies." 33 C.J. 395.

"(17) B. *Incidents of Sovereignty.* 1. *Exclusive Jurisdiction.* The jurisdiction of the nation within its own territory is necessarily exclusive and absolute; it is susceptible of no limitation not imposed by itself. No state can exer-

cise jurisdiction as of right within the territorial limits of another independent state.” 33 C.J. 397.

“(18) 2. *Equality*. Equality of states is an incident of sovereignty for, if one is in right subject to another, the former is not sovereign. But equality in this sense means “equality before the law” and not in strength, resources, and influence.” 33 C.J. 397.

The terms of the “Organic Law for Guam” are inconsistent with the definitions of sovereignty contained in the cited authorities. A sovereignty is not subordinate and under the supervision of an agency, department or of a government official.

Throughout the “Organic Act” the unincorporated territory of Guam is set off and distinguished from other Territories of the United States by use of the small letter “t” in territory and “g” in government while all other references throughout the Act to other Territories and Governments are capitalized. Thus there is clearly the recognition of a difference and a distinction between Guam and other Territories of the United States.

When Congress defined Guam as an unincorporated territory of the United States it clearly intended to distinguished Guam from Territories and to set such entity apart from them. It is obvious that the use of the word unincorporated must refer to the opposite of the concept conveyed by the word incorporated used with reference to other Territories and be intended to establish the opposite status. Yet considering the status, as disclosed by the following

cases of an incorporated Territory, even such do not possess more than a limited or qualified sovereignty.

“* * * The Territories are but political subdivisions of the outlying dominion of the United States. Their relation to the general government is much the same as that which counties bear to the respective States, and Congress may legislate for them as a State does for its municipal organizations. The organic law of a Territory takes the place of a constitution as the fundamental law of the local government. It is obligatory on and binds the territorial authorities; but Congress is supreme, and for the purposes of this department of its governmental authority, has all the powers of the people of the United States, except such as have been expressly or by implication reserved in the prohibitions of the Constitution.

In the organic act of Dakota there was not an express reservation of power in Congress to amend the acts of the territorial legislature, nor was it necessary. Such a power is an incident of sovereignty, and continues until granted away. Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the territorial legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the Territories and all the departments of territorial governments. It may do for the Territories what the people, under the Constitution of the United States, may do for the States.” *National Bank v. County of Yankton*, 101 U.S. 129, 133.

“It leaves in doubt what is meant by “State of the Union”. Ordinarily these terms would be held to apply to those political communities exercising various attributes of sovereignty which compose the United States, as distinguished from the organized municipalities known as Territories and the District of Columbia. And yet separate communities, with an independent local government, are often described as States, though the extent of their political sovereignty be limited by relations to a more general government or to other countries. Halleck on Int. Law, c. 3, §§5, 6, 7. . . . But the whole argument fails when applied to a Territory. It is not a distinct sovereignty. It has no independent powers. It is a political community organized by Congress, all whose powers are created by Congress, and all whose acts are subject to Congressional supervision. Its attitude to the general government is no more independent than that of a city to the States in which it is situated, and which has given to it its municipal organizations.” *Talbot v. Silver Bow County*, 139 U.S. 438.

“The people of the United States, as sovereign owners of the National Territories have supreme power over them and their inhabitants. In the exercise of this sovereign dominion, they are represented by the government of the United States, to whom all the powers of government over that subject have been delegated, subject only to such restrictions as are expressed in the Constitution, or are necessarily implied in its terms, or in the purposes and objects of the power itself, for it may well be admitted in respect to this, as to every power of society over its mem-

bers, that it is not absolute and unlimited. But in ordaining government for the Territories, and the people who inhabit them, all the discretion which belongs to legislative power is vested in Congress; and that extends, beyond all controversy, to determining by law, from time to time, the form of the local government in a particular Territory, and the qualification of those who shall administer it." *Murphy v. Ramsey*, 114 U.S. 15.

"Strictly speaking, there is no sovereignty in a Territory of the United States but that of the United States itself." *Snow v. United States*, 18 Wall. 317.

"Mr. Justice Bradley delivered the opinion of the court. The government of the Territories of the United States belongs, primarily, to Congress; and secondarily to such agencies as Congress may establish for that purpose. During the terms of their pupilage as Territories, they are mere dependencies of the United States. Their people do not constitute a sovereign power. All political authority exercised therein is derived from the General Government.

It is, indeed, the practice of the government to invest these dependencies with a limited power of self-government as soon as they have sufficient population for the purpose. The extent of the power thus granted depends entirely upon the organic act of Congress in each case, and is at all times subject to such alterations as Congress may see fit to adopt." *Snow v. United States*, 18 Wall. 317.

"There is, of course, no dispute as to the sovereignty of the United States over the Territory

of Washington or as to the consequent control of Congress. As an organized political division, the Territory possessed only the powers which Congress had conferred and hence the territorial legislature could not provide for escheat unless such provision was within the granted authority. *Sere v. Pitot*, 6 Cranch, 332, 337; *American Ins. Co. v. Center*, 1 Pet. 511, 543; *National Bank v. Yankton County*, 101 U.S. 129, 133." *Christianson v. King County*, 239 U.S. 356, 362.

"By the Constitution, as is now well settled, the United States, having rightfully acquired the Territories, and being the only government which can impose laws upon them, have the entire dominion and sovereignty, national, and municipal, Federal and State, over all the Territories, so long as they remain in a territorial condition. *American Ins. Co. v. Canter*, 1 Pet. 511, 542; *Benner v. Porter*, 9 How. 235, 242; *Cross v. Harrison*, 16 How. 164, 193; *National Bank v. Yankton County*, 101 U. S. 129, 133; *Murphy v. Ramsey*, 114 U.S. 15, 44; *Mormon Church v. United States*, 136 U.S. 1, 42, 43; *McAllister v. United States*, 141 U.S. 174, 181 * * * Upon the acquisition of a Territory by the United States, whether by cession from one of the States, or by treaty with a foreign country or by discovery and settlement, the same title and dominion passed to the United States, for the benefit of the whole people, and in trust for the several States to be ultimately created out of the Territory." *Shively v. Bowlby*, 152 U.S. 1.

"* * * There may be a limitation on the exercise of sovereign powers, but that State is not sovereign which is subject to the will of another. This

remark applies equally to the Federal and State governments.” *Thurlow v. The Commonwealth of Massachusetts*, 5 How. 587.

An incorporated Territory upon incorporation becomes a part of the United States and as such enjoys a special status under the Constitution. There has been a lack of distinction between Territory as a political entity and inchoate state and territories meaning a geographical area, a piece or parcel of real estate. Certain shades of meaning not given consideration were not carefully differentiated in many cases.

Congress, in Section 25 (b) of the Organic Act of Guam, clearly intended Guam to be a Possession in contemplation of law. Quoted ante page 4.

It is inconsistent with sovereignty to be a possession. A possession must be possessed and therefore the possessor who is the superior has the authority of sovereignty. It follows, therefore, that the subordinate cannot be a sovereign. These citations support this stand. *Snow v. United States*, 18 Wall. 317, cited ante page 16; *Thurlow v. The Commonwealth of Massachusetts*, 5 How. 587, ante page 18.

Under the United States Constitution the Federal government is of course sovereign and this sovereignty has been described as a limited and an external sovereignty. The constituent States are likewise sovereign. However, the United States was created by a union of separate and complete sovereignties who joined together as equals to create a new sovereign entity to which they, as sovereigns, delegated and

granted certain of their sovereign powers, at the same time reserving all other powers to themselves. They actually divided the concept of sovereignty of government and its powers into two distinct portions, the one external with respect to the rest of the Community of Nations, and the other the powers of a sovereignty within its own borders and area. This is not the case with the government of Guam. Guam had nothing. It is a pure creature of Congress. Guam was acquired by the United States by virtue of the Treaty of Paris; it was merely a piece or parcel of real estate transferred from the Crown of Spain to the United States; and its status under the Spanish Crown was that of a dependency over which Spain possessed sovereignty and ownership. It was not an organized political entity, being at best a rudimentary type of governmental agency, a true colony or possession.

The Island of Guam was not transferred to the United States as a political entity or state in being, but as a colony, or at most, an embryonic political community. It was not in any sense sovereign under Spain, the only sovereignty was that of Spain. When transferred to the ownership of the United States it became a piece or parcel of real estate owned by the United States. It became part of the outlying domain subject under the Constitution to control by Congress alone. The United States possess title to all dependencies, public domain and other property for and on behalf of the component States. Congress exercises ownership and holds title in like manner to a

trustee for and on behalf of the several States. The Island of Guam, of course, by the Treaty of Paris became a part of this property or domain.

The Treaty of Paris did not make Guam a part of the United States, it did convey ownership, full and complete, not only of title but also of sovereignty to the United States, who under our Constitution has full and complete control, political responsibility and authority over Guam.

The Constitution as disclosed by the following quotation answers this question.

“The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States or of any particular State.” Art. IV, sec. 3(2) U.S. Const.

It has been said that Congress alone has authority over such a possession. How, therefore, can any government, agency or instrumentality created by Congress to carry out a responsibility or duty of Congress possess that which Congress has not seen fit to grant? Can the creature of Congress be greater than Congress, possess wider powers and of a higher order than other Congressional agencies?

Clearly the government of Guam is not a State. Such is obvious. It is not the government of an inchoate State, or of an incorporated Territory. What, therefor, is it?

It is, of necessity, in view of the provisions of the Constitution, a legislative government. As such it cannot possess more than granted to it or more than its creators could grant. The question is, was or could such grant of sovereignty be made?

Clearly Congress did not by the "Organic Act" create a sovereignty. Congress negatived such construction by the express restrictions which were spelled out in the "Organic Act". Guam having a legislative government, being a possession, must be subordinate to Congress.

Congress is the supreme legislature for Guam. It has authority to pass laws, repeal laws, limit authority as shown in the cases cited below.

National Bank v. County of Yankton, 101 U.S. 129, 133, ante Pg. 14;

Talbott v. Silver Bow Company, 139 U.S. 438, ante Pg. 15;

Murphy v. Ramsey, 114 U.S. 15, ante Pg. 16;

Snow v. United States, 18 Wall. 317, ante Pg. 16;

Shively v. Bowlby, 152 U.S. 1, ante Pg. 17.

"Until Congress shall see fit to incorporate territory ceded by treaty into the United States, we regard it as settled by that decision (*Downes v. Bidwell*) that the territory is to be governed under the powers existing in Congress to make laws for such territories and subject to such constitutional restrictions upon the powers of that body as are applicable to the situation." *Rasmussen v. United States*, 197 U.S. 516.

“The power of Congress over the Territories of the United States is general and plenary, arising from and incidental to the right to acquire the Territory itself, and from the power given by the Constitution to make all needful rules and regulations respecting the Territory or other property belonging to the United States. It would be absurd to hold that the United States has power to acquire territory, and no power to govern it when acquired. The power to acquire territory other than the territory northwest of the Ohio River, (which belonged to the United States at the adoption of the Constitution) is derived from the treaty-making power and the power to declare and carry on war. The incidents of these powers are those of national sovereignty, and belong to all independent governments. The power to make acquisitions of territory by conquest, by treaty and by cession is an incident of national sovereignty. The territory of Louisiana, when acquired from France, and the territories west of the Rocky Mountains, when acquired from Mexico, became the absolute property and domain of the United States, subject to such conditions as the government, in its diplomatic negotiations, had seen fit to accept relating to the rights of the people then inhabiting those territories. Having rightfully acquired said territories, the United States government was the only one which could impose laws upon them, and its sovereignty over them was complete. No State of the Union had any such right of sovereignty over them; no other country or government had any such right. These propositions are so elementary, and so necessarily follow from the condition of things arising upon

the acquisition of new territory, that they need no argument to support them. They are self-evident. Chief Justice Marshall, in the case of the *American Insurance Company v. Canter*, 1 Pet. 511, 542, well said: 'Perhaps the power of governing a Territory belonging to the United States, which has not, by becoming a State, acquired the means of self-government, may result necessarily from the facts that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequences of the right to acquire territory. Which ever may be the source whence the power is derived, the possession of it is unquestioned.'

And Mrs. Justice Nelson, delivering the opinion of the court in *Benner v. Porter*, 9 How. 235, 242, speaking of the territorial governments established by Congress, says: 'They are legislative governments, and their courts legislative courts, Congress, in the exercise of its powers in the organization and government of Territories, combining the powers of both the federal and statute authorities.' "

Chief Justice Waite, in the case of *National Bank v. County of Yankton*, 101 U.S. 129, 133, said: "In the organic act of Dakota there was not an express reservation of power in Congress to amend the acts of the territorial legislature, nor was it necessary. Such a power is an incident of sovereignty, and continues until granted away. Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government. It may make a

void act of the territorial legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the Territories and all the departments of the territorial governments. It may do for the Territories what the people, under the Constitution of the United States, may do for the States.”

In a still more recent case, and one relating to the legislation of Congress over the Territory of Utah itself, *Murphy v. Ramsey*, 114 U.S. 15, 44, Mr. Justice Matthews said:

“The counsel for the appellants in argument seem to question the constitutional power of Congress to pass the act of March 22, 1882, so far as it abridges the rights of electors in the Territory under previous laws. But that question is, we think, no longer open to discussion. It has passed beyond the stage of controversy into final judgment. The people of the United States as sovereign owners of the national Territories, have supreme power over them and their inhabitants. In the exercise of this sovereign dominion, they are represented by the government of the United States, to whom all the powers of government over that subject have been delegated, subject only to such restrictions as are expressed in the Constitution, or are necessarily implied in its terms.”

“Doubtless Congress, in legislating for the Territories would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Consti-

tution from which Congress derives all its powers, than by any express and direct application of its provisions." *Mormon Church v. United States*, 136 U.S. 3.

"In treating of article IV, section 3, Judge Cooley, in his work on Constitutional Law, says: 'The peculiar wording of the provision (section 3, article IV) has led some persons to suppose that it was intended Congress should exercise, in respect to territory, the rights only of a proprietor of property, and that the people of the territories were to be left at liberty to institute governments for themselves. It is no doubt most consistent with the general theory of republican institutions that the people everywhere should be allowed self-government; but it has never been deemed a matter of right that a local community should be suffered to lay the foundations of institutions, and erect a structure of government thereon, without the guidance and restraint of a superior authority. Even in the older States, where society is most homogeneous and has fewest of the elements of disquiet and disorder, the State reserves to itself the right to shape municipal institutions; and towns and cities are only formed under its directions, and according to the rules and within the limits the State prescribes. With still less reason could the settlers in new territories be suffered to exercise sovereign power. The practice of the government, originating before the adoption of the Constitution, has been for Congress to establish governments for the territories; and whether the jurisdiction over the district has been acquired by grant from the

States, or by treaty with a foreign power, Congress has unquestionably full power to govern it, and the people, except as Congress shall provide for, are not of right entitled to participate in political authority, until the territory becomes a State. Meantime they are in a condition of temporary pupilage and dependence; and while Congress will be expected to recognize the principle of self-government to such extent as may seem wise, its discretion alone can constitute the measure by which the participation of the people can be determined.' Cooley, *Principles of Constitutional Law*, 164." *Dorr v. United States*, 195 U.S. 138.

"... The authority of Congress over the public lands is granted by section 3, article IV, of the Constitution, which provides that 'the Congress shall have power to dispose of and make all needful rules and regulations respecting the Territory or other property belonging to the United States.' In other words, Congress is the body to which is given the power to determine the conditions upon which the public lands shall be disposed of. The Nation is an owner, and has made Congress the principal agent to dispose of its property. Is it inconceivable that Congress, having regard to the interests of this owner, shall, after prescribing the main and substantial conditions of disposal, believe that those interests will be subserved if minor and subordinate regulations are entrusted to the inhabitants of the mining district or State in which the particular lands are situated? While the disposition of these lands is provided for by Congressional legislation, such legislation savors

somewhat of mere rules prescribed by an owner of property for its disposal. It is not of a legislative character in the highest sense of the term, and as an owner may delegate to his principal agent the right to employ subordinates, giving to them a limited discretion, so it would seem that Congress might rightfully entrust to the local legislature the determination of minor matters respecting the disposal of these lands." *Butte City Water Company v. Baker*, 196 U.S. 119.

Thus it is apparent that Guam is not only to be governed solely by virtue of the inherent powers of Congress granted by the Constitution but that any agency or governing body erected or created by Congress to perform its duties is of its very nature a legislative agency or government.

Therefore, with relation to the United States, what status does a legislative government hold? Is it not similar and akin to that of a subordinate political entity such as a county, a city or a town? True it is organized. It is a government, it possesses law making powers, but all political entities do so within their sphere. However only sovereignties are free to enact such laws as they see fit without supervision and without restriction. Such is not the case with Guam.

It follows of necessity that such an agency or government must be akin to and possess the nature of a county, district or municipal government rather than that of an independent or sovereign government. These concepts are set forth in the following cases:

“... A municipal corporation is simply a political subdivision of the State, and exists by virtue of the exercise of the power of the State through its legislative department. The legislature could at any time terminate the existence of the corporation itself, and provide other and different means for the government of the district comprised within the limits of the former city. The city is the creature of the State.” *East Hartford v. Hartford Bridge Co.*, 10 How. 511, 533, 534.

As is stated in the *United States v. Railroad Company*, 17 Wall. 322, 329, a municipal corporation is not only a part of the State but is a portion of its governmental power. “It is one of its creatures, made for a specific purpose, to exercise within a limited sphere the powers of the State. The State may withdraw these local powers of government at pleasure, and may, through its legislature or other appointed channels, govern the local territory as it governs the State at large. It may enlarge or contract its powers or destroy its existence. As a portion of the State in the exercise of a limited portion of the powers of the State, its revenues, like those of the State, are not subject to taxation.”

In *New Orleans v. Clark*, 95 U.S. 644, 654, it was stated by Mr. Justice Field, in delivering the opinion of the court, that “A city is only a political subdivision of the State, made for the convenient administration of the government. It is an instrumentality, with powers more or less enlarged, according to the requirements of the public, and which may be increased or repealed at the will of the legislature. In directing, there-

fore, a particular tax by such corporation, and the appropriation of the proceeds to some special municipal purpose, the legislature only exercises a power through its subordinate agent, which it could exercise directly; and it does this only in another way when it directs such corporation to assume and pay a particular claim not legally binding for want of some formality in its creation, but for which the corporation has received an equivalent.”

In *Commissioners of Laramie County v. Commissioners of Albany County et al.*, 92 U.S. 307, it was held that public or municipal corporations were but parts of the machinery employed in carrying on the affairs of the State, and that the charters under which such corporations are created may be changed, modified or repealed as the exigencies of the public service or the public welfare may demand; that such corporations were composed of all the inhabitants of the territory included in the political organization; and the attribute of individuality is conferred on the entire mass of such residents, and it may be modified or taken away at the mere will of the legislature, according to its own views of public convenience, and without any necessity for the consent of those composing the body politic.

It was said in that case that “public duties are required of counties as well as of towns, as a part of the machinery of the State; and, in order that they may be able to perform those duties, they are vested with certain corporate powers; but their functions are wholly of a public nature, and they are at all times as much subject to the

will of the legislature as incorporated towns, as appears by the best writers upon the subject and the great weight of judicial authority.” *City of Worcester v. Worcester Consolidated Street Railway Co.* 196 U.S. 539.

“... It is urged by the defendants that this court has no jurisdiction of this suit because of the eleventh amendment to the federal Constitution. That amendment is in these words; ‘The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.’ They cite authorities to the effect that a municipal corporation is an agent of the state government for local purposes, and contend, therefore, that a suit against such corporation and its officers is a suit against ‘one of the United States,’ within the meaning of that amendment. That such a corporation is such an agent is undoubtedly true, but it does not follow therefrom that a suit against it or its officers is such a suit. The most that can be said is that it is a suit against a subdivision of one of said states, not that it is a suit against one of said states itself. This being so, the amendment in question does not deny jurisdiction to the federal courts of the suit, for it denies to them jurisdiction only of suits against ‘one of the United States’ and not against a subdivision thereof. If the federal courts do not, by reason of said amendment, have jurisdiction of suits against municipal corporations, it is hard to understand upon what ground it has been that they have so

often taken jurisdiction of suits against them. So far as my research has gone, I have not found a case where it has been urged that federal courts do not have such jurisdiction, much less where it has been so held. The cases cited by counsel for defendants in support of the proposition that municipal corporations are state agencies for local purposes were mostly suits against municipal corporations, and in none of them was it suggested that the suits could not be maintained for want of jurisdiction; on the contrary, in each of them jurisdiction to dispose of them on their merits was exercised. I think it therefore clear that the jurisdiction of this court of this cause is not affected by this consideration." *Camden Interstate Ry. Co. v. City of Catlettsburg et al.*, 129 F. 421.

"... It is a cardinal principle of our system of government, that local affairs shall be managed by local authorities, and general affairs by the central authority, and hence, while the rule is also fundamental that the power to make laws cannot be delegated, the creation of municipalities exercising local self-government has never been held to trench upon that rule. Such legislation is not regarded as a transfer of general legislative power, but rather as the grant of the authority to prescribe local regulations, according to immemorial practice, subject of course to the interposition of the superior in cases of necessity. Congress has express power 'to exercise exclusive legislation in all cases whatsoever' over the District of Columbia, thus possessing the combined powers of a general and of a State govern-

ment in all cases where legislation is possible. But as the repository of the legislative power of the United States, Congress in creating the District of Columbia 'a body corporate for municipal purposes' could only authorize it to exercise municipal powers, and this is all that Congress attempted to do." *Stoutenburgh v. Hennick*, 129 U.S. 141.

There can be no question as to the existence of sovereignty over Guam and in Guam. However, it is the sovereignty of the United States. True, every governmental agency possesses, but not of its own essence, certain of the attributes of sovereignty. Such is possessed by virtue of the needs, desires, authority and for the benefit of its superior. It is not possessed by virtue of any innate authority; it is not essential to its existence and does not follow by virtue of the inflexible logic of its existence. The government of Guam can only possess such sovereignty, or in fact, such powers as may be specifically granted to it.

It cannot be as the learned trial Judge said:

"The Court: It places the government as a sovereignty beyond the jurisdiction of the United States Court, unless the Congress of the United States specifically gave it jurisdiction or unless the Government of Guam, by its own act, submitted itself to jurisdiction. It is the old theory that the king can do no wrong; the government can submit itself to suit and if it does so, it, of course, is liable like any other litigant, but if it chooses not to do so and if it is an independent

sovereignty, then the courts have no jurisdiction over the actions of the government.”

Transcript of Record Page 19.

Quoting American Jurisprudence on sovereignty

“§127. Generally.—The organization of a territory is solely in the hands of Congress. It may determine the form of the local government in a particular territory as well as the qualifications of the officers who shall administer it. In ordaining government for the territories and the people who inhabit them, all the discretion which belongs to the legislative power is vested in Congress; and that extends, beyond all controversy, to determining by law from time to time the form of the local government in a particular territory and the qualifications of those who shall administer it. The form of government for the territories which Congress shall establish is not prescribed, and need not necessarily be the same in all territories. The form generally adopted is that of a quasi-state government, with executive, legislative, and judicial officers, and a legislature endowed with the power of local taxation and local expenditures; but Congress is not limited to that form.” 49 Am. Jur. 335.

“§129. Generally.—In the territories the sovereignty of the United States is supreme and complete, and the powers of government exercised by the territories are only such as are authorized under the organic act creating the government of the territory, or by powers that are specially delegated. Within these limitations, operation of a territory is in the hands of the

inhabitants of the particular territory. 'This is true although a 'territory' is not a distinct sovereignty and has no independent powers. It is a political community organized by Congress, all of whose powers are created by Congress, and all of whose acts are subject to congressional supervision. Its attitude toward the Federal government is no more independent than that of a city to the state in which it is situated and which has given it its municipal organization.'" 49 Am. Jur. 335.

"§126. Delegation to Territorial Legislature; Control of Congress over Acts of Territorial Legislature.—When a territorial government is organized, Congress may delegate to the territorial legislature the power to enact legislation for the local government of the territory, as it has done in the various acts relating to territories and insular possessions. Once legislation is passed by the territorial legislature, it is the duty of the secretary of the territory to transmit to Congress copies of all laws enacted. These acts are subject to the disapproval of Congress, and may be amended or annulled at any time by that body, but they remain in force until Congress has exerted its authority to annul them. However, there is no presumption of an intention on the part of Congress to supersede a local territorial act in the absence of a clear expression to that effect.

Congress may not only abrogate laws of a territorial legislature, but it may make a valid act void, and a void act valid. Such a power is an incident of sovereignty, and continues until granted away, so that the failure of Congress to make express reservation in an organic act of the power

to amend or annul an act of the territorial legislature does not prevent it from exercising that power.

When the same matter is the subject of legislation by Congress and a territorial legislature, the acts of Congress supersede those of the territorial legislature. In conformity with the rule, there can be no doubt that an act of Congress undertaking to regulate commerce in the District of Columbia and the territories of the United States would necessarily supersede the territorial law regulating the same subject. If an act of Congress is inconsistent with the organic act organizing a territory or the District of Columbia, it is not for that reason invalid, for, since both acts emanate from Congress, the latter would govern. If Congress fails to notice or take action on any territorial legislation, the reasonable inference is that it approves such act." 49 Am. Jur. 335.

The holding of the court is in conflict with these authorities.

The court is reading into the "Organic Act" that which Congress did not put there. It is an interpretation of the law that is neither warranted by fact nor required by the necessity of the situation.

Guam differs in many essential respects from the Island of Puerto Rico and from the Philippine Islands. These two particular entities are, and for many years were, highly developed governments. They possessed a Structure of Government that was complete, they are organized into Provinces, Cities, Municipalities and smaller units. The problems in cases

involving those Islands differ vastly from the one before this court. This question is basic; it asks can the government of Guam refuse to submit to the authority of its creator; it is beyond the cognizance of the Courts of the United States unless it, of its own volition, decides to submit to such courts?

Can the government of Guam, by its own act, refuse to permit a court of the United States to construe a United States Statute? Can a Congressional Agency by its own interpretation expand a grant of Congress to place itself beyond reach of the Judicial Powers of the United States? We cannot concede such. To do so would permit any agency or instrumentality to hold that a part is greater than the whole.

The opinion of the trial court, if carried to its logical conclusion, says that a court of the United States is without power to determine for a Congressional creature the proper construction of a Statute of Congress; that the governmental agency created to perform a Congressional function is answerable to no one. Surely this is absurd.

This line of reasoning is based upon the series of cases popularly denominated the "insular cases". These cases discuss in detail the sovereignty of territories of the United States, the powers of the Congress with respect to a territory, and the extent to which the United States Constitution is extended and applies to territories. They hinge primarily upon these major points of law. First, to what extent does the United States Constitution apply to a territory; sec-

ond, how broad are the powers of the Congress with respect to a territory; third, the question as to the application of certain Federal laws to territories. It is fitting that these cases should be reviewed and considered to determine whether and to what extent they are controlling and in point when considering Guam.

Certain historical facts can be admitted without the necessity of submitting authorities: namely, that the Territory of Hawaii was an independent and sovereign nation at the time that by treaty it came within the sovereignty of the United States and became a Territory; and that the Philippine Islands, if not from the date of the Treaty of Paris, at least as early as the 14th day of February, 1899 were recognized as having a peculiar status, and that the intent of Congress with respect to them provides as follows:

“Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That by the ratification of the treaty of peace with Spain it is not intended to incorporate the inhabitants of the Philippine islands into citizenship of the United States, nor is it intended to permanently annex said islands as an integral part of the territory of the United States; but it is the intention of the United States to establish on said islands a government suitable to the wants and conditions of the inhabitants of said islands to prepare them for local self-government, and in due time to make such disposition of said islands as will best promote the interests of the United States and the inhabitants of said islands.” Cong. Rec., 55th Cong. 3d Sess. vol. 32, p. 1847.

This has culminated in the complete freedom of the Philippine Islands as a sovereign nation effective the 4th day of July, 1946, thus illustrating the fact that the continuing intent of Congressional policy has been, from the turn of the century, to regard the Philippine Islands as differing in their essential relationship to the United States from that of other territories appurtenant to the United States.

As to Puerto Rico, the Supreme Court determined in the cases of *Kopel v. Bingham* and *Gromer v. Standard Dredging Co.* that essentially Puerto Rico was for many reasons akin and similar to an unincorporated territory, differing in but few essential respects therefrom.

“ . . . it was said; ‘it may be justly asserted that Puerto Rico is a completely organized Territory, although not a Territory incorporated into the United States, and that there is no reason why Puerto Rico should not be held to be such a Territory . . .’ *Kopel v. Bingham*, 211 U. S. 468 . . . ‘ . . . in considering the subject and giving due weight to “the precaution against abuse” of the Puerto Rican legislative power and after calling attention to the reservation made by Congress of the right to repeal any Puerto Rican act of legislation, it was nevertheless declared (p. 370) : “The purpose of the act is to give local self-government, conferring an autonomy similar to that of the States . . .” ’ ” *Gromer v. Standard Dredging Company*, 224 U. S. 362, both quoted as authoritative in *People of Puerto Rico v. Rosaly y Castillo*, 227 U. S. 270.

Thus there has been repeated determination, judicial, legislative and historical of the exact status of these entities.

Further, in the “insular cases” culminating in the case of *Downes v. Bidwell* which is recognized as the leading authoritative “insular” case, the Supreme Court finally determined the precise status of all three and laid down the following standards:

“... Congress has been consistent in recognizing the difference between the states and territories under the Constitution . . .” “... It is a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the cases in which those expressions are used. If they go beyond the cases, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision . . .” . . . “... He further held that citizens who migrate to a territory cannot be ruled as mere colonists, and that, . . . Congress had the power of legislating over territories until states were formed from them . . .” . . . “... It is obvious that in the annexation of outlying and distant possessions grave questions will arise from differences of race, habits, laws, and customs of the people, and from differences of soil, climate and production, which may require action on the part of Congress that would be quite unnecessary in the annexation of contiguous territory . . .” . . . “... If, in limiting the power which Congress was to exercise within the United States, it was also intended to limit it with regard to such territories as the people of the United States should thereafter acquire, such limitation

should have been expressed. Instead of that we find the Constitution speaking only to states, except in the territorial clause, which is absolute in its terms, and suggestive of no limitation upon the power of Congress in dealing with them . . .” . . . “ . . . We can only consider this aspect of the case so far as to say that no construction of the Constitution should be adopted which would prevent Congress from considering each case upon its merits, unless the language of the instrument imperatively demands it . . . Choice in some cases, . . . may bring about conditions which would render the annexation of distant possessions desirable. If those possessions are inhabited by alien races, differing from us in religion, customs . . . , and the question at once arises whether large concessions ought not to be made for a time, . . . We decline to hold that there is anything in the Constitution to forbid such action . . .”

Thus, we have the conclusive determination that the territories are not States within the judicial clauses of the Constitution; that the territories are appurtenant to the United States; and that they are to be governed by the Congress under the territorial clause of the Constitution.

It is not open to question that with respect to territories appurtenant to the United States Congress alone is the supreme legislature, subject only to certain Constitutional prohibitions. Nowhere in any of these “insular” cases do we find any judicial determination or guide whatever as to what Congress may or must do.

The "insular cases" have decided whether certain clauses of the Constitution apply, by virtue of their inherent character, to all areas under United States sovereignty; whether certain laws of the United States apply to Puerto Rico, to Hawaii or to the Philippines; but nowhere in these cases do we find a discussion of whether or not there is any distinction between an organized territory and an entity specifically defined as a possession. We have been unable to find any rule of law which binds Congress in the exercise of its discretion in governing appurtenant territory. The only inference that can be drawn from the "insular cases" is that only the mandatory limitations of the Constitution restrict Congress in its complete freedom of action in governing appurtenant territories of the United States.

Inasmuch as these cases cannot be construed as limiting the discretion and latitude of choice open to the the Congress in the governing of territory appurtenant to the United States, we can only conclude that these cases while decisive as to the intent of Congress in past enactments, cannot be construed as binding with respect to other and later enactments.

These cases do not contain any statement distinguishing between a Territory akin to an Incorporated Territory and appurtenant territory specifically defined by Congress as being a possession.

Clearly, Congress had in mind the fact that there existed a legal significance in the use of the term "possession", and that a possession differed in some respects from a Territory. It would seem that except

for Constitutional limitation, Congress has absolute freedom of choice with respect to the ruling and government of a possession. In this case we feel that the intent of Congress with respect to Guam is the sole determining factor, and such intent cannot be determined by other expression of intent pertaining to other appurtenant territories of the United States prior to the passage of "The Organic Act for Guam".

Drawing the necessary distinction that Guam differs historically and presently in most basic respects from Puerto Rico, Hawaii and the Philippine Islands, and considering the controlling fact that the cases concerning these Territories are not conclusive upon Congress, we must then conclude that the intent of Congress is the final determining factor to be considered in deciding this question. The cases cited and the cases considered by appellants do not and cannot determine this question. We have under consideration a problem which has never been subjected to judicial scrutiny and evaluation. We must conclude that Guam is essentially different from Puerto Rico, Hawaii and the Philippine Islands and that Congress did not create a sovereignty by "The Organic Act of Guam". This is supported by the following citations:

Section 3 of "The Organic Act of Guam", ante pg. 9.

Section 6 of "The Organic Act of Guam", ante pg. 9.

Section 8 of "The Organic Act of Guam", ante pg. 10.

Section 19 of "The Organic Act of Guam", ante pg. 10.

"Sec. 25. (a) . . .

"(b) Except as otherwise provided in this Act, no law of the United States hereafter enacted shall have any force or effect within Guam unless specifically made applicable by Act of the Congress either by reference to Guam by name or by reference to 'possessions' . . ."

The learned District Judge did not distinguish between Guam and the other Territories. We believe that the following distinctions exist and must be drawn. We have States, Incorporated Territories (both organized and unorganized and being inchoate States), unincorporated Territories which are similar to incorporated Territories, and a final category, unincorporated territories or possessions having a government but not possessing the dignity and authority of a Territory. Guam, by Congressional enactment, can only fall into the last category.

Finally, from the text of "The Organic Act of Guam" itself and from our study of the "insular" cases cited herein, which cases we do not believe to have any bearing upon the question propounded here, it can only be concluded that Congress did not intend to create a sovereignty such as it created in the more mature dependencies of the United States, namely, Alaska, Hawaii, Puerto Rico and formerly, the Philippine Islands. Rather, Congress created a subordinate instrumentality for a specific purpose, that instrumentality being like in nature to other

Congressionally created agencies and instrumentalities of the Government of the United States, and like such other agencies and instrumentalities, the Government of Guam is not immune to suit and is subject to the jurisdiction of the courts of the United States.

SPECIFICATION OF ERROR III.

The learned trial Judge held that the Court could not take jurisdiction of the case.

It is contended that the Court was in error for the following reasons.

There is no controversy with respect to Federal Taxes, within the meaning of Section 2201 of Title 28, USCA, in the case before the Court. What is sought is a Declaratory Judgment as to the meaning of Public Law 630. It is submitted that the question before the Court is, does the "Organic Act of Guam" create a territorial tax or not?

It follows therefor that if the "Organic Act of Guam" does not create a territorial tax, the United States Income Tax Laws apply in full and as written. What is being questioned is not the United States Income Tax or its application, but whether or not this Act of Congress created a territorial Income Tax, thus incorporating, by reference, the text of the United States Income Tax Laws into the "Organic Act of Guam" and thereby into the Guam territorial statutes.

It is conceded that, whether Congress did or did not create a local income tax, nevertheless the United States Income Tax Law does apply to Guam. No question is raised as to the Federal Tax. The question is, do we have by virtue of the "Organic Act" a territorial tax also. As to United States Income Tax it is conceded that it is valid, there is no controversy. The question is, did this Act create a territorial income tax? We contend that it did not.

Section 2201 of Title 28, USCA, applies solely to controversies with respect to Federal income taxes. There is none here. To ask for a judgment that a Federal Law applies is not a controversy with respect to such law. The issue in this case is with respect to a territorial tax. What was sought was a ruling that no such tax was in existence but that the Federal Law governed, that the Federal Law applied, not the territorial. The controversy is with respect to the territorial tax. A controversy with respect to Federal Taxes or in fact any other tax, is one which questions the tax itself, its legality, its validity. The alleged territorial tax and its existence is being questioned, nothing else.

It is contended, that the learned trial Judge should have drawn this distinction, and that since what is questioned is whether or not there is a territorial tax, the controversy is about such territorial tax.

United States Courts have, by virtue of Section 1341 of Title 28, USCA, jurisdiction of controversies concerning state taxes, when no speedy or expedient

remedy is available in the courts of such State. It is submitted, that the controversy is, whether or not a territorial tax exists. Such controversy is specifically within the jurisdiction of a District Court of the United States.

The case cited below presents this distinction in a far more lucid manner than the draftsman of this brief and is considered to be in point on all fours.

“The Defendant has also questioned the jurisdiction of this court under the Declaratory Judgments Act.

Section 274d of the Judicial Code, 28 USCA, Par. 400 provided ‘In cases of actual controversy except with respect to Federal taxes the Courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleading to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment and be reviewable as such.’ *Filipowicz v. Rothensies, Collector of Internal Revenue et al.*, 31 F. Supp. 716, 721, 722.

In *Union Packing Co. v. Rozan*, D.C. 1937 17 F. Supp. 934, 940, the court declared ‘It is the specific command of the Congress of the United States that no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.’ Revised Statutes Sec. 3224, 26 USCA, Par. 1543. This command which cannot be waived by agents of the government, *Gouge v. Hart*, (D C Va. 1917) 250 F 802, by

recent enactment, has been made to apply to declaratory judgments. The Statute excepts specifically actual controversies 'with respect to Federal Taxes'. Jud. Code Sec. 274d, as amended 28 USCA, Par. 400.

(9) The foregoing Judicial construction confirms the view of this court that the clause of the Declaratory Judgments Act, underlined above, was enacted for the purpose of continuing the legislative policy of Section 3224 of the Revised Statutes. Cases arising since the passage of the provision in issue have involved challenges to the validity of varied tax impositions and, as was to be expected, such questions were found not to be within the scope of a declaratory judgment. See *W. B. Schaife and Sons v. Driscoll*, 3 Cir. 1937, 94 F. 2d 664; *Beeland Wholesale Company v. Dover*, 5 Cir. 1937, 88 F. 2d 447; *Aponaug Mfg. Co. v. Fly*, D.C. 1937, 17 F. Supp. 944. Of course the result would be the same under Section 3224 of the Revised Statutes. See *Simonin's Sons v. Rothensies*, D.C. 1936, 13 F. Supp. 807. Compare *Penn v. Glenn*, D.C. 1935, 10 F. Supp. 483, in which the court held that where a purported tax actually was not a tax but an attempt to regulate something beyond the power of Congress to regulate, a declaratory judgment to that effect was proper. *C. F. Vogt and Sons v. Rothensies*, D.C. 1935, 11 F. Supp. 225, 231.

On the other hand there is no suggestion that the permissible scope of a declaratory judgment in this regard would be more restricted than that under Section 3224 of the Revised Statute.

(10) It would seem that Section 274d of the Judicial Code should be interpreted to deny a declaratory judgment to a petitioner only where the latter could not obtain an injunction under R.S. Section 3224 against illegal seizure by a tax collector. In fact such a rule would appear to be too restrictive inasmuch as there are cases where an equity court would refuse to grant an injunction because of the failure to state the need for equitable relief, while such a prerequisite would not be necessary for a declaratory judgment. In any event it would seem clear that if a court of equity could enjoin the collector for taking illegal action, a Federal court similarly should be able to issue a declaratory judgment without violating the inhibitions against decisions as to Federal taxes.

(11) Aside from analogy to cases under R.S. Section 3224, logically it is arguable that all that is sought is a declaration of the rights of the various interested parties to the fund in question. The tax collector claims by virtue of an alleged tax lien. Plaintiff claims by virtue of an alleged prior assignment. There will be no decision as to the propriety of the tax. There is no controversy over a Federal tax. There is, however, a controversy as to the alleged rights of various claimants to specific property.

In light of this analysis it would seem evident that a declaratory judgment as to the property rights of the parties involved would be permissible." *Filopowicz v. Rothensies, Collector of Internal Revenue*, 31 F. Supp. 716, 721.

It is contended that no further citation of authorities on this point is necessary, therefore in the interest of economy of time the Appellants rest as to the point.

CONCLUSION.

The Order appealed from should be reversed. Upon the law and the facts the learned District Judge should be instructed that the government of Guam is not a sovereignty, that the District Court can take jurisdiction over the government of Guam, that this cause does not constitute a controversy with respect to a Federal Tax, that the District Court does have jurisdiction of the subject matter of this suit. That in cases of this nature additional time for research and the presentation of authorities should be allowed before proceeding to a hearing.

The Order appealed from should be reversed, as error, and appropriate instructions furnished the District Court for its guidance.

Agana, unincorporated territory of Guam, 15th of October, 1951.

Respectfully submitted,

CRAIN & PHELAN,

*Attorneys for Plaintiff-
Appellants.*

No. 13,025

United States Court of Appeals
For the Ninth Circuit

E. R. CRAIN and FINTON J. PHELAN, JR.,
on Behalf of Themselves and Other
Persons Similarly Situated,

Appellants,

VS.

THE GOVERNMENT OF GUAM,

Appellee.

Appeal from the District Court of Guam,
Territory of Guam.

APPELLEE'S BRIEF.

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Appellants,

vs.

Appellee.

APPELLEE'S BRIEF.

“The Court Did Not Exercise Sound Discretion in Refusing Plaintiff’s Oral Motion for an Extension of Time to Properly Prepare and Present Points and Authorities in Opposition to Defendant’s Motion to Dismiss.”

The answer to said point is:

Rule 6(b) of the Federal Rules of Civil Procedure provides as follows:

(b) *Enlargement.* When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under rules 25, 50(b), 59(b), (d) and (e), 60(b), and 73(a) and (g), except to the extent and under the conditions stated in them.

This rule provides for discretionary enlargement of time in two instances: (a) if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, and (b) upon motion made after the expiration of the specified period where the failure to act was the result of excusable neglect.

Rule 7(b) (1) of the Federal Rules of Civil Procedure provides as follows:

(b) *Motions and Other Papers.*

(1) An application to the court for an order shall be by motion which, unless made during a

hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

This rule requires a written motion if the motion is made before hearing. As indicated in Specification of Error I of Appellants' brief, Appellants' Motion for Enlargement of Time was made orally, and at the time of hearing of Appellee's Motion to Dismiss. Therefore, it was valid if at all, only if made in compliance with that portion of Rule 6(b) (2) which provides for discretionary enlargement of time upon motion made after the expiration of the specified period where the failure to act was the result of excusable neglect. There is no showing in Appellants' brief of "excusable neglect" which would permit the enlargement of time sought by Appellants.

In their Specification of Error I, Appellants argue on the basis of denial of additional time allegedly required to present authorities and argue points of law. This argument should have been presented by written motion filed before the date set for hearing Appellee's Motion to Dismiss, pursuant to the terms of Rule 7(b) (1).

Rule 6(d) of the Federal Rules of Civil Procedure provides a 5-day period for noticing motions, "unless a different period is fixed by these rules or by order of the court." Rule 6(b) permits enlargement by the

Court "in its discretion." Rule 6(b) is a grant of power, not a limitation. It neither states nor implies that the Court must exercise "reasonable" discretion. Appellants have cited no case indicating a requirement of reasonableness in exercise by the Court of its discretionary power.

Even admitting, without conceding, that the Court's exercise of its discretionary power is subject to review on appeal, Appellants have shown no prejudice of their case arising from the Court's action. They argued and were heard on the motion date noticed, as indicated in their brief. The Motion to Dismiss was decided on the basis of points of law involved, as indicated in the Court's decision. In the absence of a showing of prejudice, the Court's action is not subject to a reversal.

Consideration of a complaint presupposes presentation of a case supported by law. Appellants' complaint was drafted at their leisure and filed at a time of their own choosing. It is presumed that applicable legal aspects were briefed prior to preparation of the complaint. A motion to dismiss goes to the very heart of a stated case, and it is submitted that Appellants should have anticipated such a motion and should have been prepared to argue the validity of the complaint almost immediately upon service of the Motion to Dismiss. It is submitted further that the notice period of five days, codified as reasonable following the legal experience and history of our Federal Court system, is ample for preparation

of support of the complaint filed by Appellants. The complaint is a simple one, free from the complex, intricate features which sometimes require an enlargement of time for the purpose of preparing legal arguments.

The District Court stated its reasons for denying Appellants' oral Motion for Enlargement of Time. The stated reasons were not designated for the record. In the absence of such designation and argument thereon, Appellants cannot ascribe as abusive, the Court's discretionary action.

ARGUMENT IN REPLY TO POINT II IN APPELLANTS' BRIEF.

Point II of Appellants' brief is as follows:

“The Court Erred in Holding that the Government of Guam was Immune to Suit.”

The answer to said point is:

The theory of governmental immunity to suit without consent is so well established in the Anglo-American system of law that it seems beyond legal attack. Appropriate and leading cases on the subject are discussed hereinbelow. Appellants seek to avoid the application to their case of this well established rule of law. They state at page 42 of their brief:

“We have under consideration a problem which has never been subjected to judicial scrutiny and evaluation.”

It is submitted that there is nothing in this case which gives rise to a problem unique in the field of law, and that established rules of law are applicable.

The theory of Appellants is that the only governmental bodies which are immune from suit without consent are those which are independent of control in any form, i.e., true sovereigns. Appellants conclude that because Guam is not a sovereign in its strictest sense, it is not immune to suit.

Appellants devote approximately 35 pages of their total of 49 pages to consideration of the question of whether Guam is a sovereignty in its strictest sense. Throughout their discussion is the repeated definition of "Sovereignty", with quotations from authorities to the effect that sovereignty means the supreme and uncontrollable power by which persons are governed. There is no true sovereign in the United States. If the definition contended for by Appellants were to control the legal principles of this appeal, it is submitted there would be no governing body in the United States governmental system which is immune to suit without consent. The Constitution of the United States purposefully was drafted as a limitation and control of the actions of the governments of the United States and its component states. Appellants' argument is opposed to their definition of a sovereignty. They state at page 27 of their brief:

"However only sovereignties are free to enact such laws as they see fit without supervision and without restriction."

A cursory reading of the Constitution of the United States indicates numerous examples of limitation and restriction of the government of the United States, which is referred to throughout Appellants' Specification of Error II, as a true sovereign which is immune to suit.

Therefore, lengthy definitions and discussions of the term "Sovereign" are not in point. They do not resolve the issue, nor assist its resolution.

Appellants accept the theory of natural immunity to suit of states, and of Alaska, Hawaii and Puerto Rico. They deny such immunity of Guam. Since all these bodies are governing entities by virtue of constitutions and organic acts, Appellants apparently believe that governmental immunity to suit depends upon a system of governmental hierarchy. They seem to contend that as one ascends from some point in the hierarchy, immunity to suit applies, and that any government below such point has no immunity to suit. Appellants' argument is an attempt to place Guam below such point.

Appellants argue that the degree of control of governmental action establishes the point at which the immunity theory becomes effective.

The Organic Act of Alaska provides in part as follows:

"Laws submitted to Congress. All laws passed by the Legislature of the Territory of Alaska shall be submitted to Congress by the President of the United States, and, if disapproved by

Congress, they shall be null and of no effect. (Act of August 24, 1912, c. 387, sec. 20, 37 Stat. 518.)”

The Organic Act of Hawaii sets forth a large number of specific restrictions on the legislative power of the legislature of Hawaii.

Act of Apr. 30, 1900, c. 339, sec. 55, 31 Stat. 150; May 27, 1910, c. 258, sec. 4, 36 Stat. 444; July 9, 1921, c. 42, sec. 302, 42 Stat. 116; Nov. 23, 1921, c. 134, sec. 3, 42 Stat. 223.

The Organic Act of Puerto Rico provides in part as follows:

“Law to be reported to Congress. All laws enacted by the Legislature of Porto Rico shall be reported to the Congress of the United States, as provided in section 842 of this title, which reserves the power and authority to annul the same. If at the termination of any fiscal year the appropriations necessary for the support of the government for the ensuing fiscal year shall not have been made, the several sums appropriated in the last appropriation bills for the objects and purposes therein specified, so far as the same may be applicable, shall be deemed to be reappropriated item by item; and until the legislature shall act in such behalf the treasurer may, with the advice of the governor, make the payments necessary for the purpose aforesaid.” (Mar. 2, 1917, c. 145, sec. 34, 39 Stat. 961.)

The Organic Act of Guam provides in part as follows:

“All laws enacted by the legislature shall be reported by the Governor to the head of the department or agency designated by the President under section 3 of this Act, and by him to the Congress of the United States, which reserves the power and authority to annul the same. If any such law is not annulled by the Congress of the United States within one year of the date of its receipt by that body, it shall be deemed to have been approved.” (Act of Aug. 1, 1950, c. 512, sec. 19, 64 Stat. 389.)

From these quotations, it is seen that control by the government of the United States of the legislatures of Alaska, Hawaii, Puerto Rico and Guam essentially is the same. No intent of Congress to set up any degree of control as argued by Appellants can be made out.

Appellants state at page 13 of their brief:

“The terms of the ‘Organic Law for Guam’ are inconsistent with the definitions of sovereignty contained in the cited authorities. A sovereignty is not subordinate and under the supervision of an agency, department or of a government official.”

Application of such conclusion to Guam without its equal application to Alaska, Hawaii and Puerto Rico is inconsistent with Appellants’ admission of immunity to suit of such other territories.

At pages 9 and 10 of their brief, Appellants quote from various sections of the Organic Act of Guam in an attempt to show control by the Government of

the United States over the government of Guam, in addition to the legislative control discussed above. Appellants conclude at page 21 of their brief:

“Clearly Congress did not by the ‘Organic Act’ create a sovereignty. Congress negatived such construction by the express restrictions which were spelled out in the ‘Organic Act’. Guam having a legislative government, being a possession, must be subordinate to Congress.”

All Territories are subject to limitations and restrictions, in addition to those applicable to legislatures discussed hereinabove. For a general summary of restrictions on all territories, see Chapter 10 of 48 U.S.C.A. A perusal of this chapter, and a study of the provisions of the organic acts of all Territories, indicate the extent of Congressional control over such Territories.

The foregoing Territorial limitations, general and legislative, demonstrate the inconsistency of Appellants’ contention of Congressional differentiation of Territorial status for the purpose of establishing immunity to suit on the basis of degree of “Sovereignty” or degree of control.

At pages 9 and 13 of their brief, Appellants argue that Congressional intent to establish Territorial degrees of “Sovereignty” is indicated by the names given to territories by the Congress of the United States. This conclusion is not valid. The Organic Act of Puerto Rico provides that the name of the political entity shall be “People of Porto Rico.” It is

neither "Territory" nor "territory". Certainly "Sovereignty" does not derive from such a name.

At page 13 of their brief Appellants argue that the use in the Organic Act of Guam of capital letters in the words "territory" and "government" sets forth that

"there is clearly the recognition of a difference and a distinction between Guam and other Territories of the United States."

This argument is not supported by law. Although the Territories of Alaska and Hawaii are designated with a capital T, Congressional legislation establishing the governments of the Virgin Islands and Porto Rico refer to them throughout, as "Government". Act of June 22, 1936, c. 699, sec. 1, et seq., 49 Stat. 1807. Apr. 12, 1900, c. 191, sec. 1, 31 Stat. 77; May 2, 1917, c. 145, sec. 1, 39 Stat. 951, et seq. Further, as explained above, Puerto Rico is not even designated as a territory but as "People of Porto Rico."

Appellants also attempt to differentiate Guam from other territories on the basis that Guam is not politically incorporated into the United States. At page 13 of their brief, they state:

"When Congress defined Guam as an unincorporated territory of the United States is clearly intended to distinguish Guam from Territories and to set such entity apart from them."

Appellants admit immunity of Puerto Rico to suit without consent. However, Puerto Rico is not incorporated into the United States of America.

“On the whole, therefore, we find no features in the Organic Act of Porto Rico of 1917 from which we can infer the purpose of Congress to incorporate Porto Rico into the United States with the consequences which would follow.” *Balzac v. People of Porto Rico*, 42 S. Ct. 343, 348 (1922).

It is therefore apparent that there is no degree of “Sovereignty” which takes Guam from the concept of immunity applicable to Puerto Rico on the theory of incorporation of the entity into the United States.

At page 14 of their brief, Appellants quote from the case of *First National Bank of Brunswick, Maine v. County of Yankton*, 101 U.S. 129, 133. This case was decided in 1880, and held that Congress may legislate for the territory of Dakota, as a state may for its municipal organizations. The case was not concerned at any point with the question of immunity of a territory to suit.

At page 15 of their brief, Appellants quote from the case of *Talbott v. Board of County Commissioners of Silver Bow County*, 139 U.S. 438. This case, decided in 1891, involved the power of Montana territory to tax national banking associations. It was held that territories can tax such associations. The case did not involve immunity of a territory to suit.

At page 16 of their brief, Appellants quote from the case of *Murphy v. Ramsey*, 114 U.S. 15. This case, decided in 1885, concerned Congressional power over the right of suffrage in the territory of Utah. The

question of territorial immunity from suit was not involved.

Also at page 16 of their brief, Appellants quote from the case of *Snow v. United States*, 18 Wall. 317. This case, decided in 1873, involved the powers of the Attorney General of the territory of Utah and was not concerned with the question of territorial immunity from suit. It should be noted incidentally, that these early cases usually refer to the entities as “territories” rather than “Territories”.

At page 17 of their brief, Appellants quote from the case of *Christianson v. King County*, 239 U.S. 356, 362. This case was decided in 1901, and was concerned with the legislative power of the territory of Washington relative to the matter of escheat. No question of territorial immunity from suit was involved.

At pages 17 and 18 of their brief, Appellants quote from the case of *Thurlow v. The Commonwealth of Massachusetts*, 5 How. 587. This case was decided in 1847, and concerned the matter of licensing of dealers in spirituous liquors. No problem of territorial immunity from suit was involved.

At page 18 of their brief, Appellants refer to section 25(b) of the Organic Act of Guam to establish the proposition that Congress “clearly intended Guam to be a Possession in contemplation of law.” This section provides in part as follows:

“Except as otherwise provided in this Act, no law of the United States hereafter enacted shall

have any force or effect within Guam unless specifically made applicable by Act of Congress either by reference to Guam by name or by reference to 'possessions'."

A possession politically speaking is synonymous with a dependency, the meaning of the terms differing only in the manner of acquisition of title. Black's Law Dictionary, Third Edition, page 557.

The terms "territory" and "dependency" are used synonymously. Puerto Rico is referred to as both. *People of Puerto Rico v. Shell Co.*, 302 U.S. 253, 82 L. ed. 235, 58 S. Ct. 167.

Appellants' argument that Section 25(b) aforesaid confers upon Guam the status of something less than a territory, in derogation of other, and specific provisions of the Organic Act of Guam has no support in law.

Further, Appellants do not show the law to be that possessions are not immune from suit without consent. Regardless of any label which might be attached to a political entity, its immunity to suit depends upon the attributes possessed by the entity. As more fully appears hereinbelow, the basic consideration in determination of governmental immunity to suit is whether a decision allowing suit would inure to the detriment of the governmental authority over its subjects, when such authority is requisite for the public good.

Still further, if Appellants were desirous of placing a label on the government of Guam, they selected the

wrong provision of the Organic Act. The Organic Act of Guam established the government of Guam as a territory in the following words:

“Guam is declared to be an unincorporated territory of the United States . . .” (Act of Aug. 1, 1950, c. 512, sec. 3, 64 Stat. 384.)

At page 19 of their brief, Appellants refer to Guam as “merely a piece or parcel of real estate transferred from the Crown of Spain to the United States”, and also state that “The Island of Guam was not transferred to the United States as a political entity or state in being, but as a colony, or at most, an embryonic political community.” As explained hereinabove, the brief of Appellants admits immunity from suit on the part of the territory of Alaska, which is the political equivalent of Hawaii. However, at the time Alaska was ceded to the United States by Russia in 1867, there was no Alaskan government. The governing authority of Alaska remained unorganized until 1884, subject to the provisions of the act of Congress of July 27, 1868, c. 273, 15 Stat. 240 and subsequent acts. The legislative assembly of the Territory of Alaska was not established by an act of the United States Congress until August 24, 1912. Therefore, the existence of a government at the time of acquisition of territorial status is unimportant. Appellants argue that because Hawaii was a republic at the time it became a territory, and the Philippine Islands had an established government at the time they were ceded to the United States, im-

munity to suit followed naturally as an attribute of such government. Appellants' argument thus is seen to be based on isolated cases rather than on principle. Further, the question herein rests solely on the status of the government of Guam at the time of the suit and whatever its status may have been in the past is immaterial.

At page 19 of their brief, Appellants argue that when transferred to the ownership of the United States, Guam became a piece or parcel of real estate owned by the United States. Such a statement is true in Guam only to the extent that it is true in every territory and possession of the United States. The executive power of each territory is vested in a Governor, who holds his office for four years and until his successor is appointed and qualified, unless sooner removed by the President. R.S. 1841. The Secretary of each territory also is appointed by the President of the United States. R.S. 1843. Restrictions on qualifications of voters of all territories are prescribed by the Congress of the United States. R.S. Section 1860; March 3, 1883, c. 134, 22 Stat. 567. For a compilation of general provisions affecting all the territories of the United States, see 48 U.S.C.A. Chapter 10. Section 28 of the Organic Act of Guam establishes property rights in all publicly owned land of Guam. However, private rights remain as they have been since prior to acquisition of Guam by the United States, and the United States has no greater right to such property than it does to privately owned property in any territory or state within the United States.

The statement of Appellants is inconsistent with the theory of our government and factually is incorrect. Territories and possessions of the United States are governed by grant of power and authority extended by the Federal government. The United States does not "own" as a piece of real estate, such Territories and possessions.

At page 32 of their brief, Appellants state:

"True, every governmental agency possesses, but not of its own essence, certain of the attributes of sovereignty. Such is possessed by virtue of the needs, desires, authority and for the benefit of its superior."

The question for decision on this appeal is not the academic and unimportant one of whether Guam is a "sovereignty" in the strictest sense of the word. The only question with which we are concerned is whether Guam possesses, in the words of Appellants, certain of the attributes of sovereignty.

The conclusion of the question of "Sovereignty" and immunity reached by Appellants at page 43 of their brief is not supported by law, or by Appellants' brief. Appellants say:

". . . it can only be concluded that Congress did not intend to create a sovereignty such as it created in the more mature dependencies of the United States, namely, Alaska, Hawaii, Puerto Rico and formerly, the Philippine Islands."

A reading of the cases expounding the law of the matter of territorial immunity to suit without con-

sent discloses that the cases and authorities relied upon by Appellants are not in point, and that their theory is outside the law of the subject. The law is as follows:

The case of *Kawananakoa et al. v. Polyblank et al.*, 205 U.S. 349, 27 S. Ct. 526, is one of the leading cases on this subject, and summarily disposes of Appellants' theory that immunity to suit depends upon possession of "sovereignty" in its strictest sense. The following is quoted from this case, which was decided by the Supreme Court of the Territory of Hawaii and decided on appeal to the Supreme Court of the United States on April 8, 1907. In holding that the Territory of Hawaii is immune to suit without its consent, the Court stated:

"Some doubts have been expressed as to the source of the immunity of a sovereign power from suit without its own permission, but the answer has been public property since the days of Hobbes. Leviathan, chap. 26, 2. A sovereign is exempt from suit, not because of any formal conception of obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends. 'Car on peut bien recevoir loy d'autrui, mais il est impossible par nature de se donner loy.' Bodin, *Republique*, 1, chap. 8, ed. 1629, p. 132; Sir John Eliot, *De Jure Maiestatis*, chap. 3. *Nemo suo statuto ligatur necessitative*. Baldus, *De Leg. et Const. Digna Vox*, 2. ed. 1496, fol. 51b, ed. 1539, fol. 61.

As the ground is thus logical and practical, the doctrine is not confined to powers that are sov-

ereign in the full sense of juridical theory, but naturally is extended to those that, in actual administration, originate and change at their will the law of contract and property, from which persons within the jurisdiction derive their rights. A suit presupposes that the defendants are subject to the law invoked. Of course it cannot be maintained unless they are so. But that is not the case with a territory of the United States, because the territory itself is the fountain from which rights ordinarily flow. It is true that Congress might intervene, just as, in the case of a state, the Constitution does, and the power that can alter the Constitution might. But the rights that exist are not created by Congress or the Constitution, except to the extent of certain limitations of power. The District of Columbia is different, because there the body of private rights is created and controlled by Congress, and not by a legislature of the District. But for the territory of Hawaii it is enough to refer to the organic act. Act of April 30, 1900, chap. 339, sec. 6, 55, 31 Stat. at L. 141, 142, 150. *Coffield v. Territory*, 13 Haw. 478. See, further, *Territory v. Doty*, 1 Pinney (Wis.) 396, 405; *Langford v. King*, 1 Mont. 33; *Fisk v. Cuthbert*, 2 Mont. 593, 598."

In the case of *People of Porto Rico v. Manuel Rosaly Y. Castillo*, 227 U. S. 270, 33 S. Ct. 352 (1913), the Supreme Court of the United States held that the government of Puerto Rico possesses a natural immunity to suit even though it is a government not incorporated into the United States.

The Court stated at page 273:

“It is not open to controversy that, aside from the existence of some exception, the government which the organic act established in Porto Rico is of such nature as to come within the general rule exempting a government sovereign in its attributes from being sued without its consent. In the first place, this is true because, in a general sense, so far as concerns the framework of the Porto Rican government and the legislative, judicial and executive authority with which it is endowed, there is, if not a complete identity, at least, in all essential matters, a strong likeness to the powers usually given to organized territories, and, moreover, a striking similarity to the organic act of the Hawaiian Islands (act of April 30, 1900, chap. 339, sec. 6, 55, 31 Stat. at L. 141, 142 and 150). But, as the incorporated territories have always been held to possess an immunity from suit, and as it has been, moreover, settled that the government created for Hawaii is of such a character as to give it immunity from suit without its consent, it follows that this is also the case as to Porto Rico. *Kawananakoa v. Polyblank*, 205 U.S. 349, 353, 51 L. ed. 834, 836, 27 Sup. Ct. Rep. 526. This, moreover, is additionally beyond question because, in considering the nature and character of the government of Porto Rico in *New York ex rel. Kopel v. Bingham*, 211 U.S. 468, 53 L. ed. 286, 29 Sup. Ct. Rep. 190, it was said (p. 476): ‘It may be justly asserted that Porto Rico is a completely organized territory, although not a territory incorporated into the United States, and that there

is no reason why Porto Rico should not be held to be such a territory.' Besides, in *Gromer v. Standard Dredging Co.*, 224 U.S. 362, 56 L. ed. 801, 32 Sup. Ct. Rep. 499, in considering the subject and giving due weight to 'the precaution against abuse' of the Porto Rican legislative power, and after calling attention to the reservation made by Congress of the right to repeal any Porto Rican act of legislation, it was nevertheless declared (p. 370): 'The purpose of the act is to give local self-government conferring an autonomy similar to that of the states.' "

The Court concluded at page 277:

"In view, however, of the terms of the organic act, of the prior decisions recognizing that the purpose of Congress in adopting it was to follow the plan applied from the beginning to the organized territories by creating a government conforming to the American system, with defined and divided powers,—legislative, executive, and judicial,—in further view of the fact that the exercise of the judicial power here claimed would be destructive of that system, we are of opinion that it cannot be supposed that Congress intended by the clause in question to destroy the government which it was its purpose to create."

Puerto Rico has never been incorporated into the United States. *Balzac v. People of Porto Rico*, (Supra). Its immunity to suit without its consent has been established by the law in a number of cases in addition to the above-quoted case. *Veitia et al. v. Fortuna Estates*, 240 F. 256; *Richardson v. Vajardo*

Sugar Company, 36 S. Ct. 476, 241 U.S. 44, 60 L. ed. 879 (1916); *Richmond v. People of Porto Rico*, 99 N.Y.S. 743, 51 Misc. Rep. 220 (1906); *People of Puerto Rico v. Shell Co.*, 58 S. Ct. 167, 302 U.S. 253 (1937).

One striking difference between the Organic Act of Guam and that of Puerto Rico stands in sharp opposition to the attempted reasoning of Appellants. Section 7 of the Organic Act of Puerto Rico invests the

“* * * People of Porto Rico, with governmental powers as hereinafter conferred, and with power to sue and be sued as such.”

The foregoing cases held the provision of the Organic Act relative to suit did not impair the natural immunity of Puerto Rico to suit without its consent.

Section 3 of the Organic Act of Guam provides in part that:

“The government of Guam shall have the powers set forth in this act and shall have the power to sue by such name.”

This provision is a clear recognition of provision for Guam's immunity to suit without its consent.

Appellants closed their argument on this point with the statement at pages 43-44:

“Rather, Congress created a subordinate instrumentality for a specific purpose, that instrumentality being like in nature to other Congressionally created agencies and instrumentalities of the Government of the United States, and like such

other agencies and instrumentalities, the Government of Guam is not immune to suit and is subject to the jurisdiction of the courts of the United States.”

Such conclusion disregards the law. It is elemental that a subordinate agency created by the United States Government is immune to suit without consent of the United States. 54 Am. Jur., United States, sec. 138; 23 Am. Jur., Foreign Corporations, sec. 572; cases and annotation cited therein. This immunity applies to the District of Columbia. 49 Am. Jur., States, Territories, and Dependencies, sec. 144. Certainly it would apply to Guam, if Guam occupied the status attributed to it by Appellants, “a piece or parcel of real estate owned by the United States.”

Appellants cited no authority, and gave no law or reason, to establish their contention that Guam occupies a status in the United States different from Puerto Rico.

By the terms of its Organic Act, Guam is an unincorporated territory of the United States. Puerto Rico is an unincorporated territory of the United States. The law is firmly established that Puerto Rico is immune to suit without its consent. Therefore, by law and authority the government of Guam is immune to suit without its consent.

ARGUMENT IN REPLY TO POINT III IN APPELLANTS' BRIEF.

Point III of Appellants' brief is as follows:

“The Court Erred in Holding that it Could Not Assume Jurisdiction of the Subject Matter of the Suit.”

The answer to said point is:

Section 30 of the Organic Act of Guam provides in part as follows:

“All customs duties and Federal income taxes derived from Guam, * * * shall be covered into the treasury of Guam and held in account for the government of Guam, and shall be expended for the benefit and government of Guam in accordance with the annual budgets.”

Section 31 of the Organic Act of Guam provides as follows:

“The income-tax laws in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in Guam.”

The effect of the foregoing sections clearly is to create a tax liability on Guam, with collections to accrue to the government of Guam.

This conclusion is supported by the Legislative history of the Organic Act of Guam. In discussing Section 31, Congressman Miller of Nebraska stated from the floor of the House of Representatives:

“There will be no direct payment by the Treasury of this country. The amendment we have just adopted in committee provides that the in-

come-tax laws in force in the United States of America and which may hereafter be in force will be in the law over there. That will be of great help in plugging certain loopholes. The people of Guam and a large number of civilians and workers over there on construction work, as well as military personnel, pay no income tax or have no withholding tax. In fact, they are paid a bonus for working there. This will plug that loophole and bring in some money to the United States Treasury. (Cong. Rec., May 23, 1950, Vol. 96, pp. 7673 and 7674.)”

Regardless of who collects the tax created by the Organic Act of Guam, it is imposed by the Federal Government, and is levied and collected in accordance with the income tax laws of the United States.

Appellants admit that by reason of the Organic Act of Guam, the United States income tax laws apply to Guam. Page 45 of Appellants’ brief.

Upon attempt by the government of Guam to collect the Federally-imposed income tax, Appellants filed their complaint as plaintiffs, and sought a declaratory judgment holding in part:

- (1) That the Internal Revenue Code of the United States applies to Guam as written.
- (2) That the unincorporated territory of Guam is, with respect to the United States, a possession.
- (3) That the government created by the Organic Act of Guam is a government of limited and express powers.

- (4) That the Income Tax Laws of the United States are not repealed or suspended by the provisions of the Organic Act of Guam.
- (5) That the Organic Act of Guam does not create a territorial income tax.

Appellants asserted in their complaint that the government of Guam had no authority under the provisions of Section 31 of the Organic Act to impose or collect the tax there established.

Clearly, a Federal tax is involved. Equally as clearly, there is a controversy between the parties hereto, as to the proper agency for collection of the tax. The provisions of the Federal Declaratory Judgments Act preclude the remedy sought by Appellants. The Act provides as follows:

“Creation of Remedy. In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. June 25, 1948, c. 646, 62 Stat. 964, amended May 24, 1949, c. 139, sec. 111, 63 Stat. 105.”

In their complaint as plaintiffs, Appellants affirmatively asked the District Court of Guam for a decision that the tax was a Federal one, to be imposed and collected by the Federal government. The Declaratory

Judgments Act, *supra*, is a direct bar to assumption of jurisdiction by the District Court. *Noland v. Westover, et al.*, 172 F. (2d) 615; *Red Star Yeast and Products Company v. LaBiddle*, 83 F. (2d) 394; *Wilson v. Wilson*, 141 F. (2d) 599.

Appellants now seek to avoid the effect they created by their own case, on the basis that Appellees contend the tax is not a Federal one. Appellants have attempted by the application of labels, to avoid the application of a law. At page 45 of their brief, they state:

“* * * since what is questioned is whether or not there is a territorial tax, the controversy is about such territorial tax.”

If such reasoning were sound, Appellees could as well contend:

“Since what is questioned is whether or not there is a Federal tax, the controversy is in respect to such Federal tax, and the Declaratory Judgments act applies as written.”

In order to validate the contention of Appellants, the case first would have to be decided, then the rule applied as sought by Appellants. They seek to omit the first step, and proceed immediately to the conclusion of the case. Only by such reasoning could the law be avoided.

Appellants quote at length from the case of *Filipowicz v. Rothensies, Collector of Internal Revenue*, 31 F. Supp. 716, 721, and state at page 46 of their brief, that the case is “in point on all fours.”

It is submitted that the quoted case is not in point. The Court stated at page 722 of the reported decision:

“Aside from analogy to cases under R.S., section 3224, logically it is arguable that all that is sought is a declaration of the rights of the various interested parties to the fund in question. The tax collector claims by virtue of an alleged prior assignment. There will be no decision as to the propriety of the tax. There is no controversy over a federal tax. There is, however, a controversy as to the alleged rights of various claimants to specific property. In light of this analysis, it would seem evident that a declaratory judgment as to the property rights of the parties involved would be permissible.”

In the case herein, there is not a controversy as to alleged rights of claimants to specific property, as in the *Filipowicz* case, *supra*. In their complaint as plaintiffs, Appellants did not deny the existence of a tax, and in their prayer, they asked for judgment “that the Internal Revenue Code of the United States applies to Guam as written.” Appellants have shown no interest in the fund representing the amount of their tax. Their only stated interest is in who collects the tax.

The *Filipowicz* case, *supra*, is authority for the position of Appellees. The Court said as follows, at page 722:

“It would seem that Section 274d of the Judicial Code should be interpreted to deny a declaratory judgment to a petitioner only where the latter

could not obtain an injunction under R.S. 3224 against illegal seizure by a tax collector.”

R.S. 3224, referred to by the Court, was repealed by act of Congress of February 10, 1939, c. 2, sec. 4. R.S. 3224 in effect was incorporated in a subsequent act (53 Stat. 446) in the following language:

“Prohibition of suits to restrain assessment or collection

(a) *Tax.* Except as provided in sections 272(a), 871(a) and 1012(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

(b) *Liability of transferee or fiduciary.* No suit shall be maintained in any court for the purpose of restraining the assessment or collection of (1) the amount of the liability, at law or in equity, of a transferee of property of a taxpayer in respect to any income, war-profits, excess-profits, or estate tax, (2) the amount of the liability, at law or in equity, of a transferee of property of a donor in respect to any gift tax, or (3) the amount of the liability of a fiduciary under section 3467 of the Revised Statutes (U.S.C., Title 31, sec. 192) in respect of any such tax. 53 Stat. 446.”

Since appellants could not restrain collection of the tax in question, neither could they obtain a declaratory judgment with respect thereto.

CONCLUSION.

Appellee concludes that the District Court of Guam committed no reversible error and that the decision appealed from should be affirmed in its entirety.

Dated, Agana, Guam,
December 10, 1951.

Respectfully submitted,
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No. 13,025

IN THE

United States Court of Appeals
For the Ninth Circuit

E. R. CRAIN and FINTON J. PHELAN, JR.,
on Behalf of Themselves and Other
Persons Similarly Situated,

Appellants,

vs.

THE GOVERNMENT OF GUAM,

Appellee.

Appeal from the District Court of Guam,
Territory of Guam.

APPELLANTS' REPLY BRIEF.

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APPELLANTS' REPLY BRIEF.

**I. APPELLANT'S ANSWER TO APPELLEE'S ARGUMENT
ON POINT 2.**

A. The appellee in his brief at page 6, takes exception to the amount of space given by the appellant in his original brief to the question of sovereignty. The trial Court has made sovereignty an issue by holding that the Government of Guam was immuned from suit on the ancient theory "The king can do no wrong". By such a decision, the appellant was forced to show a differentiation between the status of the Government of Guam and that of other possessions

of the United States, who had some similarity. But the appellee mistakes our meaning when we state that this is a matter which has never been subjected to judicial scrutiny. The status of Guam has not as yet been determined by the Courts. It is a new entity established as of July 1, 1950. The only case quoted in Title 48, U. S. Code Annotated, Chapter 10, 1951 Annotations, relative to this problem is the within case. As will be shown hereafter by appellant, there are many differences between the Island of Guam and other territories and possessions cited by the appellee.

It is interesting to note, for example, that in the 1949 and 1950 budgets of the United States Government, no provision was made for the Island of Guam. The Navy administered the possession and had certain funds set aside for Naval shore establishments. (1950 U. S. Government Budget, Navy Department, Bureau of Yards and Docks, page 841.) After the passage of the Organic Act of Guam, the 1951 budget, however, allotted funds to the Department of Interior with the following statements at page 889 under the section on territories and island possessions:

“GUAM. Effective July 1, 1950, the administration of the Island of Guam will be transferred from the Department of the Navy to the Department of Interior. This activity provides for the salary of the Governor, the per diem for the legislators, the salary of the Chief Justice, and the expenses of the office of the Governor and the Supreme Court. Guam does not presently have a sufficiently developed economy to support the completely governmental services through local

revenues. A grant is therefore provided for the support of services essential to public health, safety and welfare.”

This was an official publication of the United States Government. It has no legal effect but is certainly evidence of the lack of certain aspects of sovereignty as previously discussed by the appellant.

On page 7, the appellee states “therefore, lengthy definitions and discussions of the term sovereign are not in point. They do not resolve the issue nor assist its resolution.” We submit that the Government of Guam has made an issue of sovereignty but agree that the real problem here is that of construing a statute of the United States. The Government of Guam through edicts of their Governor (a federal employee of the United States) has decreed that a certain system of taxation exists on Guam. The Governor of Guam has interpreted Section 31 of the Organic Act of Guam so as to require payment into their treasury of income taxes similar to that in existence in the United States. They have based their contentions upon a certain information bulletin of the Treasury Department of the United States, to wit, I. T. 4046, 1951-6-13559, construing Section 251 of the Internal Revenue Code. That bulletin states:

“Inasmuch as Guam is not excepted in the provisions of Section 251 of the Code (Internal Revenue Code of the United States) the bureau is of the opinion that it should be considered a possession of the United States for Federal income tax purposes, regardless of its classification as an un-

incorporated territory by the Organic Act of Guam. It follows, therefore, that a domestic corporation would satisfy the condition set forth in Section 251a of the Code, is taxable for Federal income tax purposes only with respect to income derived from sources within the United States.

“The effect of Section 31 of the Organic Act of Guam is to set up a separate income tax for Guam which is a duplicate of the Federal income tax.”

One agency of the United States Government, the Internal Revenue Department, has construed a statute without the benefit of the United States Courts. Another agency of the United States Government, to wit, the Department of Interior acting through the Governor of Guam, is attempting to put into effect the construction of its fellow agency. We submit that the real issue is one which has not yet been determined and has not been subjected to judicial scrutiny, i.e., can an agency or employee of the United States construe statutes of the United States and by such construction oust the Courts of the United States from jurisdiction to determine the correctness of their decision? We submit, however, that in order to answer that question there must be a determination made as to whether or not the rule of sovereignty does apply. In this connection it should be noted again that the Treasury Department states “regardless of the classification of Guam under the Organic Act,” thereby clearly showing a difference between Guam and other possessions.

B. Appellee states at page 7, "they seem to contend that as one ascends from some point in the hierarchy, immunity to suit applies, in that any government below such point has no immunity to sue." The appellant has not made any claim as to such a hierarchy. Appellant has merely pointed out that there are strong and specific distinctions between the other territories cited and that of the Island of Guam. It should be noted that Guam alone reports to an appointive officer. (Organic Act Section 19.) On the other hand, the other territories have been accorded by Congress the dignity of reporting directly to the President and through him to Congress. We believe that this is a substantial matter and not to be lightly dismissed. In actual practice, the Government of Guam does what the Secretary of the Interior directs it to do and it functions similarly to any other subordinate agency of that department. Appellee quotes in his brief, pages 8 and 9, the specific portions of the Organic Act of Alaska, Puerto Rico and Guam, which shows such a distinction but the appellee fails to notice the specific wording of the statute.

Appellee also fails to recognize that we are questioning the construction of a statute of the United States pertaining to certain taxes. It should be noted that the other territories involved, to wit, the Virgin Islands and Puerto Rico, were specifically excluded from Section 251d of the Internal Revenue Code of the United States at the same time a system of taxation was set up in their community. The Virgin

Islands received their right to a separate system of taxation in 1922. The Congress then passed the Internal Revenue Code of 1922, excluding the Virgin Islands from exemption under the statutes on income received from possessions. Section 262-A of that Act reads:

“That in the case of citizens of the United States or domestic corporation, satisfying the following conditions, gross income means only gross income from sources within the United States.”

The term “United States” was defined in Section 2078 as:

“The term ‘United States’ as used herein includes only the States, the territories of Alaska and Hawaii, and the District of Columbia.”

It should be noted at this point that a specific distinction is thereby made between Alaska and Hawaii and Guam, which is included in the following paragraph, where it states:

“The term ‘possession of the United States’, as used in Articles 1135, 1136, and this Article, includes Puerto Rico, the Philippine Islands, the Panama Canal Zone, Guam, Wake, and Palmira. *It does not include the Virgin Islands.*”

By this act, Guam was placed in a separate classification from Hawaii, Alaska, and the Virgin Islands. At that time it was in the same classification as Puerto Rico.

The history of the income tax law on the Island of Puerto Rico, too, becomes an important factor in

making a determination as to the status of Guam. The Internal Revenue Department in Internal Revenue Cumulative Bulletin 1946-5-12254, I. T. 3788, stated, in construing the Revenue Code, at page 55, and after going over the historical facts of the entry of the Island of Guam into the Government of the United States as a possession:

“In view of the foregoing (historical facts) it is held that citizens of Puerto Rico who are citizens of the United States * * * and who are not residents of the United States, are subject to Federal Income Tax *only* (italics added) upon income derived from sources within the United States in the same manner and subject to the same conditions as non-resident aliens.”

Again in 1950, and at the same session of the Congress of the United States at which the Guamanian Organic Act was passed, an amendment was added to Section 251D, Internal Revenue Code, as follows:

“As used in this Section, the term ‘possession of the United States’ does not include the Virgin Islands of the United States, *and such term when used with respect to citizens of the United States, does not include Puerto Rico.* (Amendment italicized 1950 Act, Section 221-A.)”

The Internal Revenue Department, in I. T. 4047, 1951-8-13571, makes a determination as to the meaning of this statute, and quotes the historical reasons as to why the income tax law was not previously applied in full to citizens of Puerto Rico, and now makes such application. Appellant respectfully asks this

Court and the appellee that if the Congress of the United States had not specifically recognized a distinction between Guam and the other possessions, then why did they not include Guam when adding Puerto Rico to the exclusion under Section 251D? It will be seen from the foregoing that insofar as income taxes are concerned, there has certainly been a major difference between Guam and the other U. S. possessions.

C. Appellee, on pages 12 through 17 of his brief, attempts to pass over lightly the cases quoted by the appellant by saying: (a) They are old. (b) The decisions are on different points, not on immunity. We are somewhat surprised at the implication that because the cases were old they were not of any value to this Court in making a determination. A careful reading of the cases and of our original quotations proves that the statements relative therein to the status of the territories and their relations to the Congress of the United States were necessary to the decision and not mere dicta. Such a reading will further indicate that characteristics of a sovereign are very particularly described therein and are certainly applicable to the facts at hand.

D. At the bottom of page 13, the appellee quotes a portion of Section 25B of the Organic Act, but he fails to quote the remainder of that section, which is as follows:

“The President of the United States shall appoint a commission of seven persons, at least three of whom shall be residents of Guam, to survey the field of Federal Statutes and to make recom-

mendations to the Congress of the United States, within twelve months after the date of the enactment of this act, as to which Statutes of the United States not applicable to Guam on such date shall be made applicable to Guam, and as to which Statutes of the United States applicable to Guam on such date shall be declared inapplicable.”

This indicates without question that insofar as the laws of Guam are concerned, they are still in a state of flux and as yet the Government of Guam is not a sovereign power which can carry out a complete system of laws. This contrasts sharply with Section 3 of the Organic Act of Alaska (Act of August 24, 1912, c. 387, Sec. 20, 37 Stat. 518), which states:

“Constitution and Laws of the United States extended—That the Constitution of the United States and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said territory as elsewhere in the United States.”

E. The case of *Kawananakoa v. Pollybank*, 205 U.S. 349, 27 S. Ct. 526, is cited by the appellee as being the leading authority on the proposition of immunity to suit. Mr. Justice Holmes in that case stated, as quoted by the appellee at page 19:

“The doctrine is not confined to powers that are sovereign in the full sense of juridical theory, but naturally is extended to those that, *in actual administration, originate and change at their will, the laws of contract and property, from which*

persons within the jurisdiction derive their rights."

Does the Government of Guam seriously contend that they have the right to "originate and change at their will the laws of contract and property", in view of the foregoing portion of the Act, which gives to a commission, appointed by the President of the United States, the right to determine what laws shall be applicable to the Island of Guam? We do not think that they can seriously so contend.

Discussing the aforesaid case and the general proposition of immunity of a sovereign, Mr. Justice Frankfurter stated in his dissent in the recent case (1943) of *Great Northern Life Insurance Co. v. Reed*, 322 U.S. 54, at page 59:

"Whether this immunity is an absolute survival of the monarchical privilege or is a manifestation merely of power, or rests on abstract logical grounds (see *Kawananakoa v. Pollybank*), it undoubtedly runs counter to modern democratic notions of the moral responsibility of the State. Accordingly, Courts reflect a strong legislative momentum in their tendency to extend the legal responsibility of government, and to confirm Maitland's belief, expressed nearly 50 years ago, that 'it is a wholesome sight to see the Crown sued and answering for its tort' (3 Maitland Collected Papers, 263)."

F. In quoting the case of the *People of Puerto Rico v. Manuel Castillo*, 227 U.S. 270, on page 20 of their brief, appellee states:

“It is not open to controversy that, aside from the existence of some exception, the government which the Organic Act established in Puerto Rico is of such nature as to come within the general rule exempting a government sovereign, etc.”

Appellant contends that that decision was based upon the general assumption that there were exceptions and that the particular nature of the government in Puerto Rico was binding. We contend again, that those exceptions exist in this case; that the differences have been pointed out by your appellant; that their law is in a state of flux, having not as yet been determined by the Federal Commission; that none of the arguments or authorities cited by appellee are binding; that in truth and fact such substantial differences exist between Guam and other possessions that immunity to suit should not and cannot obtain.

II. ANSWER TO ARGUMENT IN REPLY TO POINT 3.

A. The appellee starts out this portion of his brief on page 24 by quoting the Organic Act, Sections 30 and 31, stating:

“The effect of the foregoing sections clearly is to create a tax liability on Guam, with collections to accrue to the Government of Guam.”

He states further:

“Regardless of who collects the tax created by the Organic Act of Guam, it is imposed by the Federal Government, and is levied and collected in accordance with the Income Tax Laws of the United States.”

The appellant fails to see, by any stretch of the imagination, how the aforesaid section can be construed to create a tax liability on Guam. As a matter of fact, in practice, the Government of Guam follows the thesis of the Department of Internal Revenue, when it stated in I. T. 4046 (*supra*) that a dual system of taxation exists on the Island of Guam as a result of these sections of the Organic Act. Appellant contends that far from being immaterial as to who collects the tax in question, a careful reading of the Internal Revenue Code will show that there are specific sections as to who can and shall collect income taxes, and provisions for methods of payment for taxpayers outside of a collection district. We further believe that it is very important as to whether the tax is collected by a properly authorized Collector of Internal Revenue, thus affording a taxpayer all his remedies and recourses in the event that he feels he has any cause for complaint, or whether it is collected by an irresponsible local official acting without statutory authorization.

B. Appellee states, at page 26:

“Clearly, a Federal Tax is involved.”

That is begging the question. If this was purely a Federal Tax, then why would it be necessary for the Government of Guam to bring up the question of sovereign immunity at all? The appellant does not ask the Court to determine solely that a Federal Tax exists; that is admitted by all the parties; it is a part of I. T. 4046 (*supra*); is not at issue. We ask: “Does the Government of Guam have the right under the Organic Act, to collect a territorial tax?” Per-

haps, in our original complaint we may have asked for more than one relief. Are we to be precluded from a remedy by reason of such surplusage? That certainly is not in accord with the general rules of practice in the Federal Courts of the United States.

C. The appellee quotes the provisions of the Federal Declaratory Judgments Act, with reference to the exceptions in cases of Federal taxes. We have contended and do contend that what is involved here is the collection of a territorial tax by the Government of Guam. Surely the appellee cannot deny the right of this Circuit Court of Appeals, sitting as a Court of Equity, to make a decision on the problem. The case of *Smith v. Ames*, 169 U.S. 466, states, at pages 517-520, discussing the problem of enjoining enforcement of certain rates for transportation on the grounds that the statute prescribing them was repugnant to the Constitution of the United States:

“Under the principles which in the Federal system distinguish cases in law from those in equity, the Circuit Court of the United States, sitting in equity, can make a comprehensive decree, covering the whole ground of controversy, and thus avoid the multiplicity of suits that would inevitably arise under the statute.”

This is not a matter of mere labels, as indicated by the appellee on page 27, but a matter of right. The individuals concerned on the Island of Guam are, under Section 31 of the Organic Act, subjected to the Income Tax Laws of the United States. There is a Federal Income Tax Law applicable to them. Unless they meet certain conditions they must pay taxes to

the Tax Collector of the United States. In addition to that, however, the Government of Guam is attempting to collect a territorial tax. We submit that there is no such tax.

The appellee assumes, in quoting the case of *Filipowicz v. Rothensies*, 31 Federal Supplement 716, and a portion of RS-3224, that no suit could be maintained to restrain collection of the tax in question, and that by reason therefor, a declaratory judgment may not be obtained under Section 274-D of the Judicial Code. The appellee neglects to examine the exceptions noted in Section 272-A with reference to income tax assessments, collection and deficiency, where it is stated:

“Notwithstanding the provisions of Section 3653-A, the making of such assessment or the beginning of such proceeding or restraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court.”

Certainly, if the laws of the Island of Guam were not in such a state of flux at the moment that the Courts cannot know what laws to apply, the above exceptions would be brought into play and in the proper case an injunction to restrain collection of the tax in question could be obtained. We submit, therefore, that a declaratory judgment is permissible under the circumstances.

In summary, it would seem that the situation simply is this: The Government of Guam says:

“The Organic Act of Guam provides for Federal Income Taxes on Guam with the exceptions set

out in Section 251-d, so that Guamanians would not ordinarily pay Income Tax, if they met certain conditions. But in addition to that, the Act set up a dual system, so that we get the tax money we need for our budget.”

The appellant says:

“But there isn’t any language to set up such a dual system of taxation and the history of the other possessions in similar circumstances, such as the Virgin Islands, and Puerto Rico, indicates that they weren’t taxed until specifically excluded from Section 251-d of the Internal Revenue Code.”

The Government of Guam says:

“You heard our decision, and you can’t sue us to refute it. We’re a sovereign who can do no wrong.”

We submit that every man is entitled to his day in Court; that it is for the Federal Court to make a determination whether Federal agencies can set themselves up as omnipotent entities and whether, by so doing, they become final authorities on the construction of the Statutes of the United States Congress.

Dated, February 11, 1952.

Respectfully submitted,

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